No. 88-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD
ABELMAN FRAYNE REZAC & SCHWAB
Attorneys for Petitioners
708 Third Avenue
New York, New York 10017
(212) 949-9022

* *Counsel of Record*

QUESTIONS PRESENTED

Section 223(b) of the Communications Act, 47 U.S.C. § 223(b) (Supp. I. 1983), prohibits in the District of Columbia or in interstate commerce, the making of any obscene or indecent communication by means of a telephone for commercial purposes to any person, under eighteen years of age or to any person without that person's consent, regardless of whether the maker of such communication placed the call. In a proceeding brought pursuant to 28 U.S.C. §§ 2342 and 2343 to review the action of the Federal Communications Commission in promulgating regulations under this section of the Act, the Court of Appeals for the Second Circuit severed the words "or indecent" from Section 223(b) of the Communications Act and declared the remainder of the statute constitutional. Subsequently, on April 28, 1988, Section 223(b) was amended to prohibit the making of any obscene or indecent communication by means of a telephone for commercial purposes to any person, regardless of their age, and regardless of whether the maker of such communication placed the call. The questions presented are:

1. (a) Whether Section 223(b) of the Communications Act, 47 U.S.C. § 223(b) (Supp. I 1983), is facially invalid due to vagueness and overbreadth by its proscription of any obscene or indecent communication made by means of telephone for commercial purposes to any person.

(b) Whether the deletion by the Court of Appeals for the Second Circuit of the words "or indecent" from Section 223(b) of the Communications Act, 47 U.S.C. § 223(b) (Supp. I. 1983), to render the statute constitutional is contrary to Congressional intent and destroys the Congressional purpose of the statute, which was to restrict indecent speech, not just obscene speech.

2. Whether Section 223(b) of the Communications Act, 47 U.S.C. § 223(b) (Supp. I. 1983), creates an impermissible national standard of obscenity in violation of the First Amendment to the United States Constitution.

3. Whether Section 223(b)(4)(B) of the Communications Act, 47 U.S.C. § 223(b) (Supp. I. 1983), violates due process of law

by not requiring *scienter* as an element of the crime of making a communication to a member of the protected class.

4. Whether Section 223(b)(4)(B) of the Communications Act, 47 U.S.C. § 223(b)(4)(B) (Supp. I. 1983), violates due process of law by reposing in the Federal Communications Commission the authority to initiate, prosecute, adjudicate and punish alleged violations of Section 223(b).

LIST OF PARTIES

The only parties not listed in the caption are those persons who were granted leave to intervene by the Court of Appeals for the Second Circuit. The names of those intervenors are the American Telephone and Telegraph Company; the New York Civil Liberties Union; the Ameritech Operating Companies consisting of the Illinois Bell Telephone Company, the Indiana Bell Telephone Company, Incorporated, the Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc.; the Bell South companies consisting of Bell South Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company; the Bell Atlantic telephone companies consisting of The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company and New Jersey Bell Telephone Company; and Pacific Bell.

CORPORATE PARTY'S AFFILIATIONS

Petitioners have no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners Carlin Communications Inc. (hereinafter "Carlin"), Sapphire of Arizona Inc., Joy Communications of California Inc., Lynx Communications of California Inc., Sable Communications of California Inc., Sapphire of Colorado Inc., Sapphire Communications of Florida Inc., Sapphire of Georgia Inc., Sapphire of Iowa Inc., Sapphire Communications of Kentucky

Inc., Sapphire of Louisiana Inc., Joy Communications of Maryland Inc., Sapphire Communications of Maryland Inc., Joy Communications of Michigan Inc., Sapphire of Michigan Inc., Sapphire of Minnesota Inc., Sapphire of Nebraska Inc., Sapphire of Nevada Inc., Sapphire of Oregon Inc., Joy Communications of Pennsylvania Inc., Sapphire Communications of Pennsylvania Inc., Sapphire Communications of Texas Inc., Sapphire of Virginia Inc., Sapphire of Washington Inc. and Sapphire of Washington, D.C. Inc., respectfully request that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered on January 15, 1988 and modified on April 4, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals as modified on denial of the petition for rehearing (A-1 – A-27)[1] is reported as *Carlin Communications, Inc. v. F.C.C.*, 837 F.2d 546 (2d Cir. 1988) (hereinafter "Carlin III"). The two prior opinions of the Court of Appeals are reported as *Carlin Communications, Inc. v. F.C.C.*, 749 F.2d 113 (2d Cir. 1984) (hereinafter "Carlin I") (A-121 – A-140), and *Carlin Communications, Inc. v. F.C.C.*, 787 F.2d 846 (2d Cir. 1986) (hereinafter "Carlin II")(A-70 – A-89).

The Federal Communications Commission (hereinafter "FCC") adopted the Third Report and Order, Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, F.C.C. 87-143, 2 F.C.C. Rcd 2714 (1987), (A-28 – A-64), the subject of review by the Court of Appeals. The regulations and a summary of the Third Report and Order were published in the Federal Register on May 12, 1987 (52 Fed. Reg. 17,760)(A-65 – A-69).

---

[1] All references in parenthesis beginning with "A-" followed by a number are to the numbered pages of Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1988 (A-144 – A-145). A petition for rehearing was denied and the opinion was modified on April 4, 1988 (A-1 – A-27). The mandate of the Court of Appeals was entered on May 10, 1988 (A-144 – A-145). This petition for certiorari is being filed within the prescribed period of ninety days after April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

2. Section 223(b) of the Communications Act of 1934, 47 U.S.C. § 223(b), as enacted by Section 8 of the Federal Communications Authorization Act of 1983, Pub.L. No. 98-214, § 8, 97 Stat. 1467, 1469, provides:

> (1) Whoever knowingly -
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

(3) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4) (A) In addition to the penalties under paragraphs (1) and (3), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(5) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

On April 28, 1988, the President signed into law H.R. 5, Remarks by the President During Signing Ceremony for H.R.5 (April 28, 1988) (Available in the White House Office of the

Secretary) (A-157—A-158), which includes an amendment to Section 223(b) of the Communications Act of 1934, 47 U.S.C. § 223(b), that takes effect July 1, 1988, (A-155—A-156), and after amendment, Section 223(b) will read as follows:

> (1) Whoever knowingly—
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) (A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (B) A fine under this paragraph may be assessed either—
>
> (i) by a court, pursuant to a civil action by the Commission or any attorney employed by the

Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

3. The regulations involved (which relate only to Section 223(b) of the Communications Act of 1934 prior to its amendment, effective July 1, 1988) are contained in the Federal Communications Commission's Third Report and Order, Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials (A-28—A-64) and provide:

It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b), that the defendant has taken one of the actions set forth in paragraph (a), (b) or (c) of this section to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with paragraph (d) of this section, where applicable:

(a) Requires payment by credit card before transmission of the message; or

(b) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) Issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) Established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(c) Scrambles the message using frequency inversion techniques so that it is unintelligible and incomprehensible to the calling party without use of a descrambler by the calling party; and

(d) Where the defendant is a message sponsor or subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to his message service be subject to billing notification as an adult telephone message service.

STATEMENT OF THE CASE

In February 1983, Carlin's predecessor-in-interest commenced offering sexually suggestive pre-recorded messages to persons voluntarily dialing the designated "Dial It" telephone number on the "Dial It" telephone system for metropolitan New York Area Codes 212, 516 and 914 assigned to it by the New York Telephone Company. "Dial It" service permits simultaneous access of a single telephone number by multiple callers to a prerecorded message and is used by providers of time, weather, sports or other information. Subsequently, the other petitioners initiated similar "Dial It" services in area codes in locations outside of New York and are presently providing this service in areas such as Philadelphia, Pittsburgh, Los Angeles, San Francisco, San Diego, Baltimore, Sacramento, Seattle and Portland (Oregon). All of petitioners' telephone services provide prerecorded messages on local telephone numbers, however, in some area codes, petitioners' local telephone numbers can be accessed

through long distance telephone calls. The operating telephone companies share revenues with message providers for intrastate calls. Until recently, Carlin was the only petitioner to share revenues with operating telephone companies for interstate calls. New York Telephone Company has recently amended its practice so that at this time Carlin, like all the other petitioners, does not earn or share any revenues from interstate calls.

On April 26, 1983, H.R. 2755 was introduced in the United States House of Representatives, authorizing appropriations to the FCC for fiscal year 1984-85. On June 29, 1983, Congressman Thomas J. Bliley offered an amendment to H.R. 2755, entitled "Clarification and Administration of § 223" to add § 223(b) to the Communications Act of 1934, 47 U.S.C. § 223. The Bill was specifically directed at Carlin's so-called "Dial-A-Porn" activities. *See*, Statement of Rep. Bliley on "Dial-A-Porn", Amendment to H.R. 2755, 98th Cong., 1st Sess. (June 29, 1983) (A-146—A-150). On November 18, 1983, Congress passed and on December 8, 1983, the President signed H.R. 2755 amending § 223 of the Communications Act of 1934, 47 U.S.C. § 223, to add § 223(b). Section 223(b) as enacted prohibits any "obscene or indecent" communication for commercial purposes to any person under 18 years of age or to any person without that person's consent, regardless of whether the maker of the communication placed the call. Section 223(b) also contains provisions regarding civil and criminal sanctions if a violation is found. In addition, the statute provides a defense to prosecution if the defendant restricts access to the communication in accordance with procedures which the FCC was directed to prescribe by regulation.

The FCC in its *First Report and Order*, (FCC 84-253) (June 5, 1984) (A-141—A-143), initially attempted to satisfy the legislative mandate by a regulation which set up a defense to prosecution under § 223(b) if the defendant either operated solely between the hours of 9:00 p.m. and 8:00 a.m. or required payment by credit card before transmission of the messages. In *Carlin I*, 749 F.2d 113 (2nd Cir. 1984), the Second Circuit struck down the regulation as unconstitutional under the First Amendment to the United States Constitution without deciding the constitutionality of § 223(b) itself.

Thereafter, the FCC adopted its *Second Report and Order*, (FCC 85-554) (October 10, 1985), 50 Fed. Reg. 42,699 (October 22, 1985) (A-90 – A-120), incorporating a revised regulation which provided a defense to prosecution if the defendant required an authorized access or identification code before transmission of the subject message. The Second Circuit issued its opinion on this regulation in *Carlin II*, 787 F.2d 846 (1986). In *Carlin II*, the Second Circuit set aside the regulation as it applied to providers in the New York telephone system. Again the Court specifically did not pass on the constitutionality of § 223(b).

Thereafter, the FCC again issued regulations establishing a defense to prosecution in a *Third Report and Order*, (FCC 87-143) (May 4, 1987), 52 Fed. Reg. 17,760 (May 12, 1987) (A-28 – A-64), if the provider required payment by credit card, required an access code or scrambled its messages so that the message could only be received intelligibly by using a descrambling device. Petitioners sought review of the FCC's *Third Report and Order* by the Second Circuit pursuant to 28 U.S.C. §§ 2342 and 2343 and 47 U.S.C. § 402(a).

In passing upon the third attempt at regulation, the Second Circuit, in its opinion set forth at 837 F.2d 546 (1988), ruled first that the regulations promulgated for the third time by the FCC were constitutionally valid. Second, the Second Circuit found that the statute's ban on communications to minors of "obscene or indecent" material would, if construed literally, be unconstitutionally vague and overbroad. Specifically, the Court stated: "Were the term 'indecent' to be given meaning other than the *Miller* obscenity, we believe the statute would be unconstitutional". *Carlin III*, 837 F.2d at 569. The Court then concluded that it was empowered to sever the invalid portion of the statute – the words "or indecent" – and that the statute as so amended passed constitutional muster.

Third, the Second Circuit held that Section 223(b) does not create an impermissible national standard for obscenity. The Second Circuit did note that providers may be forced to comply with the most stringent local obscenity standard to avoid liability but stated that resolution had to wait for a challenge to the statute as applied.

Fourth, the Second Circuit held that it was premature to rule on whether Section 223(b) violates due process of law by reposing in the FCC the authority to initiate, prosecute, adjudicate and punish alleged violations of Section 223(b).

The Second Circuit did not rule on petitioners' claim that Section 223(b) violates due process by not requiring *scienter* as an element of the crime of making an obscene or indecent communication by telephone to a member of the protected class.

The Second Circuit directed the FCC to reopen its proceedings to consider the beep-tone device as an optional defense when a prototype was manufactured. A petition for rehearing was filed and on April 4, 1988, the Second Circuit issued an opinion (A-1—A-27) modifying its original opinion to direct the FCC to reopen its proceedings to consider the beep-tone device or any other less restrictive technology as an optional defense.

The United States Congress responded to the Second Circuit decision in *Carlin III* by amending § 223(b) to delete any reference to transmission of messages to minors, so that *any* transmission of "obscene or indecent" messages is prohibited as of July 1, 1988. H.R.5, 100th Cong., 2d Sess., 134 Cong. Rec. H-1717—H-1806 (April 19, 1988) (A-155—A-156). It also eliminates the defense to prosecution of restriction of access to minors and the requirement that the FCC promulgate regulations calculated to restrict access to minors. Lastly, the amended legislation does *not* strike the phrase "or indecent," specifically retaining the two-part "obscene or indecent" standard.

REASONS FOR GRANTING THE PETITION

Petitioners submit (1) that in this case the Court of Appeals for the Second Circuit has decided important questions of federal law which have not been, but should be specifically determined by this Court, or in the alternative, (2) that the Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court.

I

Section 223(b) as enacted in 1983 prohibits the transmission to minors of obscene or indecent messages over the telephone

by commercial providers of such messages. On April 28, 1988, after the Second Circuit issued its decision in *Carlin III*, Section 223(b) was amended, effective July 1, 1988, to prohibit "obscene or indecent" communication by means of a telephone to any person, regardless of age. The amendment did not create a new statute outlawing obscene or indecent telephone communications. The amendment of Section 223(b) restored the language "or indecent" which the Second Circuit had severed from the statute in *Carlin III*. The question of whether the Second Circuit was correct in striking the words "or indecent" from Section 223(b) has not been mooted by the recent amendment of Section 223(b).

In *Miller v. California*, 413 U.S. 15, *reh. denied*, 414 U.S. 881 (1973), this Court set forth the constitutional parameters within which the government has authority to regulate allegedly obscene expression, stating that a statute designed to regulate obscene material must specifically define the conduct which is being regulated. 413 U.S. at 23-24. The question presented here is whether the federal government can constitutionally prohibit "any obscene or indecent communication" by means of a telephone and make criminal constitutionally protected expression.

Congress in enacting Section 223(b) of the Communications Act in 1983 included the proscription of indecent communications, while omitting "lewd", "lascivious" and "filthy" communications, relying on this Court's decision in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, *reh. denied*, 439 U.S. 883 (1978) (hereinafter "Pacifica"). Cong. Rec. H-10,559 (November 18, 1983) (A-151—A-152). The Second Circuit held that *Pacifica* does not justify the regulation of indecent telephone messages as telephone communications and radio are different media which are accessed differently, nor did *Pacifica* decide that the indecent broadcast of George Carlin's "Filthy Words" monologue would justify a criminal prosecution. *Carlin III*, 837 F.2d at 560. As Section 223(b) specifically authorized criminal prosecution, the Second Circuit determined that if the term "indecent" were given any meaning other than obscenity as defined in *Miller v. California*, 413 U.S. 15, Section 223(b) would be unconstitutional.

Carlin III, 837 F.2d at 560. Employing the standard set forth in *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984), the Second Circuit severed the words "or indecent" from the statute and declared the remainder of the statute constitutional. *Carlin III*, 837 F.2d at 560-61.

This Court has not determined the constitutionality of a statute or regulation prohibiting obscene or indecent communications voluntarily accessed by means of telephone. While it is recognized that the government may adopt more stringent controls on communicative materials available to minors, this Court has held that minors are entitled to a significant measure of First Amendment protection and that the government may bar public dissemination of protected materials to minors only in relatively narrow circumstances. *Erznozik v. Jacksonville*, 422 U.S. 205, 212-13 (1975). Moreover, subsequent to the Second Circuit's ruling in *Carlin III* that the inclusion of the words "or indecent" renders Section 223(b) unconstitutional, Congress passed and the President signed into law on April 28, 1988 an amendment to Section 223(b) which continues the prohibition of obscene *or* indecent communications by telephone, and as of July 1, 1988, extends the prohibition of these communications to any person, regardless of age, as well as eliminating all defenses to prosecution. Congress has made it clear by this amendment that its intent all along has been to prohibit and make criminal constitutionally protected expression.

The enactment of Section 223(b) raises a serious federal question of law as to whether the federal government can constitutionally prohibit "any obscene or indecent communication" by means of a telephone. The *Pacifica* case, relied upon by Congress when it enacted Section 223(b) in 1983, dealt with the F.C.C. regulation of obscene or indecent language on radio. The *Pacifica* holding has been explicitly limited to the broadcast media due to the ability of the media to invade the privacy of homes and the technological scarcity of available frequencies. *Pacifica*, 438 U.S. at 750; *see Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Prior cases before this Court which come closest to presenting a question similar to that in this case would be *Hamling v. United States*,, 418 U.S. 87, *reh. denied*, 419 U.S. 885 (1974) and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Hamling*, this Court upheld legislation prohibiting the transmission of obscene matter sent through the mail. In *Bolger*, this Court struck down legislation regulating mailings advertising birth control, noting that the receipt of mail is far less intrusive and uncontrollable.

Lower courts have struck down legislation prohibiting adult access to indecent speech on cable television in part because cable subscribers must affirmatively subscribe to the service and because the technology exists to enable parents to prevent children's access to objectionable programs. *See Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir. 1985); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 48 (D.C. Cir.), *cert denied*, 434 U.S. 829 (1977); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982). Similarly, the Ninth Circuit held that an Arizona statute banning the distribution of sexually explicit material to children as applied to telephone "Dial It" services was overbroad and observed that in contrast to the broadcast media, individual listeners to "Dial It" services must take deliberate steps to hear the particular kinds of messages that they choose. *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988).

It should be noted that technology also exists to enable parents to prevent children's access to telephone "Dial It" services deemed objectionable by the parents. Petitioners do not agree with that portion of the Second Circuit's decision in *Carlin III* which upholds the FCC's Third Report and Order. However, in view of the recent amendment to Section 223(b) eliminating the defense to prosecution and the regulations of the FCC restricting access to minors, petitioners do not wish to burden this Court by raising issues with respect to the FCC regulations as they are essentially rendered moot by the amendment to Section 223(b). Petitioners are therefore not appealing that portion of the decision.

By prohibiting "obscene or indecent communications" in Section 223(b), Congress is not merely regulating the transmission of speech in a manner so as to avoid harming children, but by the breadth of the language "obscene or indecent communications", Congress is attempting to regulate the contents of speech.

II

A second substantial question of federal law is whether Section 223(b) creates an impermissible national standard of obscenity which chills speech in contravention of the First Amendment to the United States Constitution. In *Miller v. California*, 413 U.S. 15, this Court stated:

> [u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'. These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.
>
> • • •
>
> *It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept pubic depiction of conduct found tolerable in Las Vegas, or New York City* . . . . People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity.

413 U.S. at 30-33 (emphasis added).

See Hamling v. United States, 418 U.S. at 102-107; *Mishkin v. New York*, 383 U.S. 502, 508-509, *reh. denied*, 384 U.S. 934

(1966). The converse is equally true. The First Amendment cannot be read as requiring that public depiction of conduct found tolerable in Las Vegas or New York be prohibited in Las Vegas or New York because that conduct is unacceptable in Maine or Mississippi.

The Second Circuit held that Section 223(b) does not create an impermissible national obscenity standard any more than do federal laws prohibiting the mailing of obscene materials or the broadcasting of obscene messages on radio. *Carlin III*, 837 F.2d at 561. This holding is not in accord with the applicable decisions of this Court which were relied upon by the Second Circuit, specifically, *Smith v. United States*, 431 U.S. 291 (1977) (prohibition of mailing of obscene material); *Hamling v. United States*, 418 U.S. 87; *Pacifica*, 438 U.S. 726. In those cases, the geographical situs of publication of expression was under the control of the publisher who determined into which communities it would disseminate a particular communication and could adapt the disseminated expression to the community standards of the intended market.

The exact opposite situation exists in the case of telephone messages offered on "Dial It" services by petitioners and others, as the Second Circuit acknowledged when it stated,

> "True, telephone messages differ from mailings and broadcastings because *the caller*, rather than the provider controls where the message is received. Individuals can access adult telephone messages from anywhere in the country, potentially subjecting the providers of such messages to suit in any district."

Carlin III, 837 F.2d at 561 (emphasis supplied). The standard of obscenity (or indecency) which would be applied would be the state of the enforcement proceeding and not necessarily the state in which the "Dial It" service is located. *See, e.g., Hamling v. United States*, 418 U.S. at 106-107. For example, on the basis of messages provided by Carlin in New York on its local telephone number, the U.S. Attorney for the District of Utah obtained

indictments in Salt Lake City, Utah under 47 U.S.C. § 223(a) and 18 U.S.C. §§ 1462 and 1465, which were later dismissed. *United States v. Carlin Communications, Inc.*, 815 F.2d 1367 (10th Cir. 1987). In addition, unrelated third party providers located and operating in California were also prosecuted in Salt Lake City, Utah by the U.S. Attorney and were required to go out of business in addition to paying huge fines. Los Angeles Times, April 14, 1987 at 2 (A-153); U.S.A. Today, April 14, 1987, at 7A (A-153); Associated Press, April, 1987 (A-154).

Since providers of pre-recorded telephone messages cannot control the geographical situs of the publication of their messages and accordingly adapt the messages for the intended market, to avoid the sanctions of Section 223(b), petitioners and other providers will be compelled to offer only prerecorded messages that are acceptable under community standards of that community which is least tolerant of sexually suggestive entertainment.

This Court in the past has rejected the imposition of a national standard of obscenity out of solicitude for the least tolerant community. *See, e.g., Miller v. California*, 413 U.S. 15, 32, *reh. denied*, 414 U.S. 881 (1973). This Court has not specifically determined whether Congress can impose a national standard of obscenity to protect the least tolerant community by prohibiting the transmission of obscene or indecent communications by telephone where the provider has no control over the geographical situs which originates the communication. The Second Circuit stated that this is a matter for resolution only if and when the statute is challeged as applied. *Carlin III*, 837 F.2d at 561. Section 223(b) imposes criminal sanctions for violations and petitioners as providers of sexually suggestive telephone messages face a real and present danger of indictment. In an analogous case this Court recently allowed a pre-enforcement challenge to a Virginia statute which sought to regulate the exhibition of books that contained material "harmful to juveniles" on the ground that "the law is aimed directly at the party, who, if their interpretation of the statute is correct, would have to take significant and costly compliance measures or risk criminal

prosecution." *Virginia v. American Booksellers Association*, 108 S.Ct. 636, 642 (1988); *Houston v. Hill*, 107 S.Ct. 2502, 2508 n.7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *Doe v. Bolton*, 410 U.S. 179, 188, *reh. denied*, 410 U.S. 959 (1973) (where there is a sufficiently direct threat of personal detriment, one is not required to await and undergo a criminal prosecution as the sole means of seeking relief).

III

A third substantial question of federal law is whether Section 223(b) deprives persons otherwise subject to its provisions of due process of law. Section 223(b) does not require *scienter* as an element of the crime of making an obscene or indecent telephone communication to a member of the protected class, i.e., a person under eighteen years of age or to any person without that person's consent. There is no requirement that the person making the communication must know that the receiver of the communication is a member of the protected class, even though the receiver of the communication placed the call. Although petitioners raised this argument in their brief in support of the petition for review, the Second Circuit did not address this question.

By not requiring *scienter* as an element of the crime of making a communication to a member of the protected class, Section 223(b) imposes strict or absolute criminal responsibility for the transmission of obscene or indecent communications by telephone. This Court has determined that the imposition of strict criminal liability for the dissemination of obscene material tends to impose a severe limitation on the public's access to constitutionally protected matter and is violative of the First Amendment to the United States Constitution. *Ginsberg v. New York*, 390 U.S. 629, 633-44, *reh. denied*, 391 U.S. 971 (1968); *Smith v. California*, 361 U.S. 147 (1959), *reh. denied*, 361 U.S. 950 (1960).

IV

A fourth substantial question of federal law is whether Section 223(b) violates due process of law by reposing in the FCC

the authority to initiate, prosecute, adjudicate and punish alleged violations of Section 223(b). The Second Circuit held that it was premature to rule on this question. *Carlin III*, 837 F.2d at 561. As set forth more fully in Point II, *supra*, this Court has permitted pre-enforcement challenges to statutes where the challenger faces a direct threat of personal detriment. *E.g.*, *Virginia v. American Booksellers Association*, 108 S.Ct. 636 (1988).

Section 223(b)(4)(B) empowers the FCC to initiate civil actions, to initiate and hold its own hearings and to assess fines for alleged violations of Section 223(b). Due to the lack of guidance in the statute and the moral judgments required in determining what is an obscene or indecent telephone communication that should be prosecuted or should be held to be a violation of Section 223(b), the risk of arbitrary and capricious governmental action is exceedingly high. Lower courts confronted with procedures such as these which concentrate the functions of complainant, jury, judge and "executioner" in one entity, have struck them down as violative of due process. *Cruz v. Ferre*, 571 F.Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD

ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York 10017
(212) 949-9022

Attorneys for Petitioners

**Counsel of Record*

July 5, 1988

APPENDIX

CARLIN COMMUNICATIONS, INC., Sapphire of Arizona, Inc., Joy Communications of California Inc., Lynx Communications of California Inc., Sable Communications of California Inc., Sapphire of Colorado Inc., Sapphire Communications of Florida, Inc., Sapphire Communications of Georgia Inc., Sapphire of Iowa, Inc., Sapphire Communications of Kentucky Inc., Sapphire of Louisiana Inc., Joy Communications of Maryland Inc., Sapphire Communications of Maryland Inc., Joy Communications of Michigan Inc., Sapphire of Michigan Inc., Sapphire of Minnesota Inc., Sapphire of Nebraska Inc., Sapphire of Nevada Inc., Sapphire of Oregon Inc., Joy Communications of Pennsylvania Inc., Sapphire Communications of Pennsylvania Inc., Sapphire Communications of Texas Inc., Sapphire of Virginia Inc., Sapphire of Washington Inc., and Sapphire of Washington D.C. Inc., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and The United States of America, Respondents,

Ameritech Operating Companies, American Telephone and Telegraph Co., Bell-South Corporation, Southern Bell Telephone and Telegraph Co. and South Central Bell Telephone Co. ("BellSouth Companies"), Bell Atlantic, and Pacific Bell, Intervenors.

No. 87, Docket 87-4054.

United States Court of Appeals,
Second Circuit.

Argued Sept. 21, 1987.

Decided Jan. 15, 1988.

As Modified on Denial of Rehearing
April 4, 1988.

Provider of "dial-a-porn" services sought review of FCC regulations establishing defenses for prosecutions for allowing access to minors. The Court of Appeals, Oakes, Circuit Judge, held that: (1) record supported FCC's determination that a scheme involving access codes, scrambling, and credit card payments was a feasible and effective way to serve the compelling state interest of protecting minors from obscene speech; (2) means chosen by the FCC were the least restrictive; (3) FCC would be required to reopen proceeidngs if beep-toned devices became available; (4) underlying statute does not unconstitutionally delegate power to the FCC; (5) statute is not unconstitutionally overbroad; and (6) "indecent" as used in statute has meaning of *"Miller"* obscenity, and, if overbroad, can be severed from statutes.

Petition for review denied and mandate stayed.

Before OAKES and LEARSE, Circuit Judges, and BONSAL, District Judge.

OAKES, Circuit Judge:

The Federal Communications Commission ("Commission" or "FCC") has once again issued regulations establishing a defense to prosecution under section 223(b) of the Federal Communications Commission Authorization Act of 1983, 47 U.S.C. § 223(b) (Supp. I 1983), which regulates interstate "dial-a-porn" services. The commission adopted the Third Report and Order, Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, FCC 87-143, 2 FCC Rcd 2714 (1987),[1] in response to this court's decisions in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (*"Carlin I"*), and *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir.1986) (*"Carlin II"*). The regulations in the Third Report and Order establish that providers of "obscene or indecent" messages ("the providers") have a defense to prosecution if they (1) require payment by credit card before transmission of the message; (2) require an access code before transmission of the message, issue the code by mail after

reasonably ascertaining through receipt of a written application that the applicant is at least eighteen years old, and establish a procedure to cancel the code upon notice that it was lost, stolen, or used by a minor; or (3) scramble their messages so that they can be received intelligibly only by using a descrambling device. In addition, where a provider subscribes to mass announcement services ("MAS") tariffed at the Commission, prior to transmission of the message, it must request in writing that the carrier providing the service identify all adult telephone messages on consumers' bills. 52 Fed.Reg. 17,760, 17,761 (1987) (to be codified at 47 C.F.R. § 64.201). The issue presented here is whether this regulating scheme is a feasible and effective method for restricting minors' access to obscene telephone messages, without unreasonably interfering with the constitutional rights of the service provider to send, and adults to receive, such messages.

FACTUAL BACKGROUND

While we assume familiarity with our prior decisions in *Carlin I* and *Carlin II*, for ease of consideration here we briefly review the FCC's past efforts to regulate adult telephone message providers. In its First Report and Order, the Commission sought to restrict the operation of petitioner Carlin Communications, Inc. ("Carlin"), and other adult telephone message providers to the hours between 9:00 p.m. and 8:00 a.m., Eastern Time. 49 Fed.Reg. 24,996 (1984). We held those regulations both overinclusive and underinclusive; the time-channeling regulations denied adults access to dial-a-porn messages during daytime hours but did not prevent minors from calling the service during nighttime hours. *Carlin I*, 749 F.2d at 121. We concluded that the Commission had "failed adequately to demonstrate that the regulatory scheme [wa]s well tailored to its ends or that those ends could not be met by less drastic means." *Id.*

---

[1] The regulations and a summary of the Third Report were published in the Federal Register on May 12, 1987. 52 Fed.Reg. 17,760 (1987).

Following *Carlin I*, the Commission adopted a Second Report and Order on October 10, 1985 (published October 22, 1985, 50 Fed.Reg. 42,699). In the Second Report and Order, the Commission rejected all network blocking by which outgoing calls are impeded at telephone company central offices. It found exchange (three- or four-digit) blocking constitutionally flawed because it blocked all "dial-it" messages and ineffective since MAS numbers are not legally or technically required to be assigned to 976 exchanges. It rejected line number (seven-digit) blocking as inadequate to handle the large number of adult message providers currently in operation. The Commission also rejected message scrambling. Although scrambling is technologically feasible and relatively simple, the Commission concluded that it misallocated the burdens by requiring adults who desire to hear the messages to install descrambling devices at a cost of $15 or $20 each. 50 Fed.Reg. at 42,704 paras. 21, 22. The Commission concluded in the Second Report that the most effective means of restricting minors' access to dial-a-porn services, while at the same time minimizing restrictions on adults, was to require providers to send messages only to adults who first obtained an access code or paid by credit card. *Id.* at 42,707 para. 32.

In *Carlin II*, we found that the Commission's findings relative to network blocking were fully supported by the evidence and clearly not arbitrary and capricious. However, we held that the Commission did not adequately consider customer premises blocking and, in particular, the feasibility of shifting the cost of blocking to message providers. *See* 787 F.2d at 855-56. This failure was particularly troubling because access codes were feasible only with two-way transmission. We therefore set aside the regulation as to the one-way, New York Telephone MAS network. *Id.* at 857. In neither *Carlin I* nor *Carlin II* was it necessary to or did we pass on the constitutionality of section 223(b).

The Commission released its Third Notice of Proposed Rulemaking on July 18, 1986, some three months after our

Decision in *Carlin II*.[2] The Commission first observed that total calling volume to the New York Telephone and New England Telephone and Telegraph Companies' ("NYNEX") "dial-it" system had declined from 471 million calls in 1984 (1.29 million per day) to 159 million calls in the months of January to April 1985 (435,000 per day). Of these, 97 million were made to "adult entertainment numbers" in 1984 (266,000 per day), while 26 million (72,000 per day) were made to such numbers between January and April 1985. In fact, NYNEX had reported that, during the first four months of 1985, total MAS calling volume had risen to 1.32 million calls per day while adult entertainment calls had dropped to 218,000 per day.

Next, the Commission briefly reviewed ways to restrict minors' access to these messages. It noted that New York Telephone Co. ("NYT") planned to install a separate, dedicated one-way system with screening capability. The so-called Varick Cut-Thru System would permit the dial-a-porn operator to implement an access code verification procedure. A screening mechanism at the telephone company's central office would send dial-a-porn calls to the providers' offices where access codes could be verified and the adult messages transmitted directly to the caller. The Commission noted that the Varick system would have a capability of 30,000 calls per hour, sufficient to handle the 9,089 calls per hour made to adult programming during early 1985. The Notice also discussed the costs and problems associated with customer blocking devices and scrambling. Finally, to comply with *Carlin II*, the Commission sought public comment on the feasibility, the costs and cost allocation, the benefits, and the efficacy of access codes, blocking equipment and scrambling in the region served by NYT. In particular, the Commission sought comment concerning the feasibility of implementing access codes in one-way systems such as NYNEX; the status of the proposed Varick system, and the ability of subscribers to obtain the identity, address, and number of adult telephone message providers.

In response to the Third Notice, the Commission received numerous comments and reply comments. Comments from

---

[2] A summary of the Third Notice was published in the Federal Register on July 28, 1986. 51 Fed. Reg. 26,915 (1986).

the following entities are included in our record: Carlin; American Telephone and Telegraph Co. ("AT&T"); Ameritech Operating Companies; Bell Atlantic Telephone Companies; NYNEX; Pacific Bell; Phone Programs, Inc.; the Public Service Commission of the District of Columbia; Southwestern Bell Telephone Co.; Telecommunications Technology Corp.; American Civil Liberties Union ("ACLU"); BellSouth Corp.; United States Telephone Association; and the Media Law Clinic.

Carlin's comments disputed the Commission's conclusion that access codes were the least restrictive alternative. It argued that they are impermissibly overbroad and vague, that any written application procedure would chill expression and would violate individual rights of privacy, and that any requirement that access codes be cancelled on misuse or loss would be impracticable and ineffective. Carlin also contended that screening or blocking is not technically feasible. Noting that this court had already found limitations upon operational hours unconstitutional, Carlin argued that the only constitutionally permissible regulations were disclaimers and limitations on advertising.

AT&T commented that effective screening could be achieved in conjunction with one-way mass announcement services by connecting interactive access lines to each AT&T 900 service mass distribution center. However, the costs of such screening would be significant. AT&T concluded therefore that message scrambling is a cost-effective and simple alternative within non-interactive networks. It commented that, contrary to the Commission's earlier understanding of descrambling devices, e.g., Second Report, 50 Fed.Reg. at 42,704 para. 22, scrambling technology is not unduly cumbersome. AT&T reported that battery-operated portable descramblers are available at little cost. AT&T commented that customer-premises blocking would be both ineffective and unduly burdensome on persons wishing to restrict access. It also contended that message providers, not common carriers, should bear the costs of the screening procedures. AT&T noted that information concerning message providers may be disclosed pursuant to administrative subpoenas. They added that disclosure of

identification information upon request could be a condition of tariff arrangements between telephone companies and message providers.

The Ameritech Operating Companies urged the Commission to focus on requirements for the providers, rather than the telephone companies. It endorsed a multiple-choice defense approach permitting providers to select the most feasible and economical defense for their particular operation and location. It suggested that permissible defenses include the use of credit cards, access codes, or scrambling; the provision of customer-premises blocking devices capable of seven- or ten-digit programming; and the furnishing of information identifying the names and telephone numbers of dial-a-porn services, coupled with billing notification. Ameritech reported the results of a survey conducted on its behalf assessing interest in customer premises blocking devices among randomly selected households with children under eighteen years of age. When price was not mentioned between 70.2% and 73.6% of households were interested in a device or service that would block dial-a-porn calls. However, only 3.3% to 5.4% indicated they would definitely purchase such a device or service if it cost only seventy-five cents per month. Similarly, at a one-time charge of $20, only 2.2% to 4.5% of households indicated they would definitely purchase the product or service.

Bell Atlantic Telephone Companies also endorsed a "menu" of alternative defenses but emphasized that the provider be required to implement the most effective means feasible given the characteristics of its operation. It urged that access codes be the preferred alternative. Bell Atlantic has already developed a billing system to prevent charging persons who call providers but lack an access code. Under its system, a caller is not charged for an audio-text call unless he or she remains on the line for more than ten or twenty seconds. Bell Atlantic requires all providers to notify callers that they are subject to a charge if they remain on the line. The Chesapeake and Potomac Telephone Co. of Maryland offers a similar service for intrastate calls. Bell Atlantic suggested, however, that billing notification be an

alternative defense only where providers lack a two-way connection with the caller and the exchange carrier cannot accommodate an access code system. Bell Atlantic commented that several customer premises blocking devices are currently available. One such device, retailing at $89.95, permits callers to program and block up to ten different telephone numbers. Bell Atlantic was not aware of any service listing the telephone numbers of dial-a-porn providers. It stressed that providers must be responsible for administering and financing any customer premises blocking program.

NYNEX also supported a multiple-choice defense. It reported that NYT planned to replace its one-way mass announcement system with a state-of-the-art two-way system by mid-1988. Providing access code capability on NYT's existing 976 mass announcement system would cost over $21 million. However, NYNEX noted that the Varick system, which provides mass announcement capability to providers with telephone numbers beginning with the prefix 970, could be modified using the Varick Cut-Thru Approach to provide two-way connections. NYNEX noted that to acquire fifty to one hundred circuits, providers would incur one-time costs of approximately $36,000 to $73,000 and recurring monthly charges of $6,000 to $12,000. Installation would take one to three months. The Varick system accommodates 30,000 calls per hour. NYNEX observed that "[i]f all adult channels on both New York Telephone systems were put onto the Varick system and retained their current calling volumes, this capacity limitation would be exceeded." However, it noted that "compliance with the Commission's access code approach will undoubtedly reduce calling volumes."

NYNEX endorsed the use of customer premises blocking devices noting that such devices are available and not difficult to install, maintain, or program. NYNEX noted that allocating the cost of such devices presented difficult administrative and policy problems. While arguing that the telephone companies should not be required to subsidize the cost of such devices, NYNEX suggested that providers that provide such subsidies should have a defense to prosecution under section 223(b).

NYNEX reported that NYT will provide the names and addresses of providers using its MAS system to assist those using customer premises blocking devices.

NYNEX also urged that a defense be available to providers that scramble their messages or request that NYT and AT&T block all incoming calls to their numbers, noting that both practices are effective and inexpensive means to restrict minors' access to dial-a-porn messages. Finally, NYNEX reported that adult entertainment calls on NYT had dropped from over 14 million a month in 1983 to below 5 million a month in 1986 and that they constituted 12.9% of all MAS calls, a decrease from 37.6% in 1983.

Pacific Bell commented that the access code and credit card payment requirements were the least restrictive, yet feasible and effective means to restrict minors' access to dial-a-porn. Pacific Bell noted that although it had announced plans to offer a customer premises blocking device to subscribers in earlier submissions to the Commission, it had since concluded that no device existed which could accommodate the total number of dial-a-porn services. Pacific Bell concurred with the Commission's Second Report that message scrambling was not well-tailored to the ends of the regulatory scheme because (1) it was impossible to enforce an age requirement for purchasing a descrambler; (2) such a requirement would not prevent minors from activating decoders purchased by adults; and (3) scrambling would prevent adults from obtaining access to dial-a-porn messages from pay telephones which are not equipped with descramblers.

Phone Programs, Inc., a provider of over sixty dial-it non-adult entertainment programs, also submitted comments. It expressed concern that the Commission might require cessation of all dial-it services, a resolution Phone Programs found unconstitutionally overbroad. It argued that neither the providers of non-obscene, non-indecent programming nor their customers should bear the costs associated with regulating obscene or indecent communication.

The Public Service Commission of the District of Columbia recommended that the FCC require access codes or credit card payment except where access codes were not feasible. In such cases it suggested that providers have a defense to prosecution if they sell at cost customer-premises blocking devices or if they scramble their messages.

Southwestern Bell Telephone Co. endorsed access codes, credit card payment, and scrambling. It argued that providers must bear the costs of the blocking or scrambling devices. Southwestern Bell noted that it provides upon request the name, address, and telephone number of all providers using its 976 services.

Telecommunications Technology Corporation submitted comments urging the Commission only to require providers to supply information to telephone subscribers. It contended that calls to 976 exchanges should be treated the same as calls to 555, 411, or 900 numbers—the customer should bear the cost of unauthorized calls from the customer's premises. Telecommunications Technology, however, did note that a customer premises blocking device is available for $89.95 which can be programmed to block certain 976 numbers or all calls except specific numbers.

In its reply comments, AT&T endorsed a "multiple choice" defense. It noted that scrambling and interactive access arrangements are the only technically feasible and economically practical means to restrict minors' access to adult telephone messages in non-interactive access arrangements. AT&T concluded that access codes could be used in conjunction with AT&T's 900 service and NYT's Varick Cut-Thru System if message providers purchased dedicated voice-grade access facilities.

Bell Atlantic submitted reply comments contending that access codes were feasible, citing the millions of people who used access codes to place long distance calls. Bell Atlantic added that where access codes were not possible, providers should be able to use scrambling as a defense. It also noted that it no longer

believed that billing notification alone should be a defense since Bell Atlantic, and many other exchange carriers, already provided billing notification for audiotext services. It therefore recommended that billing notification be an adjunct to scrambling.

BellSouth Corp., South Central Bell Telephone Co., and Southern Bell Telephone and Telegraph Co. ("BellSouth") submitted reply comments endorsing a "multiple choice" approach. They noted that their two-way system can accommodate access codes and credit card payment.

In its reply comments, Pacific Bell noted that network blocking was not feasible in its region; it would cost $25 million, yet not be able to handle probable calling volumes or operate without administrative difficulties. Pacific Bell added that its 976 network could not accommodate providers' requests to block all incoming interstate calls.

Southwestern Bell Telephone Co. commented in reply that network blocking was prohibitively expensive and ineffective. It reiterated its strong opposition to proposals that local exchange companies subsidize customer premises blocking devices. It suggested that the publication of lists of dial-a-porn telephone numbers would lead to increased calls from minors. In response to Carlin's suggestion that a five-second warning urging minors to hang up precede all adult messages, Southwestern Bell commented that customers who did hang up would still be charged for the calls.

United States Telephone Association submitted brief reply comments stressing that local exchange carriers could not be held responsible for the nature of the providers' communications or for the costs of regulating such services.

In its reply comments the ACLU asserted that the responsibility of protecting children from exposure to sexually oriented materials must lie with parents, not the government. It argued that the underlying statute, section 223(b), was unconstitutional. The ACLU added that scrambling and customer premises

blocking were less restrictive means of implementing that section than were access codes. It urged the Commission to rescind its rule, adopt the customer premises blocking approach, and allocate all of the associated costs to the telephone subscribers.

NYNEX's reply comments noted that it already provided billing notification for all interstate dial-a-porn calls but that it could not report local calls on customers' bills without extensive and expensive modifications to NYT's system. NYNEX did not object to providers' inserting messages instructing callers that the messages were intended for adults only, but added that the calling parties would be charged even if they hung up after hearing the warning message. It added that, upon a customer's request and payment, it would install a standard network interface device to facilitate the installation of a customer premises blocking device.

The Media Law Clinic of New York Law School submitted a statement by John W. Olivo, Jr., a law student with training in electrical engineering. He proposed that a provider preface its message with a three-part tone burst designed to activate a listening device installed at the customer's premises. Upon "hearing" the tone burst, the device would immediately disconnect the telephone line, so that the caller could not hear the message. A "listening" device could be installed at the terminal block or at individual outlets. While such devices are not yet manufactured, Olivo suggested similar technology presently costs between $5 and $10. Southwestern Bell, Bell Atlantic, and NYNEX commented favorably on Olivo's proposal, though the latter two added that the system needed further study.

In the Third Report, the Commission stated that its objective was "to select the option effectively restricting access to the communications in question to adults which is the least intrusive upon protected forms of expression." 2 FCC Rcd at 2719 para. 32. It rejected customer premises blocking on the basis that there is "no demonstration in the record that such devices could be effective" since they are "easily disabled by unplugging, or by

reprogramming, by the minor." *Id.* at 2719 para. 34. Moreover, if the device were placed at the network interface or demarcation point of the premises, many parents would have to install an interface jack at a cost of $25 to $65. If the demarcation point is outside the residence or in a less accessible location, reprogramming the device to block new or changing numbers would be difficult. *Id.* The Commission referred to Ameritech's survey that only 5% or fewer families would use customer premises blocking devices, even at nominal costs. *Id.* at 2720 para. 35. The Commission noted that such devices would block calls by adults, especially if the devices were placed at inaccessible locations. *Id.* at 2720 para. 36. Relying on 1980 census figures that there are 30 million families with children under eighteen, and assuming that the typical cost per family of customer premises blocking devices was $25, the Commission calculated that, if 5% used the devices, the total cost would be $37.5 million. *Id.* at 2720 para. 37. The Commission further estimated that if providers covered one-third of that cost, each of the one hundred or so adult message providers would be responsible for $125,000. *Id.*

The Commission noted that since access codes could be used within the NYNEX system in conjunction with the Varick system, it was reestablishing access codes as a defense to prosecution in areas served by NYT. *Id.* at 2720 para. 39. The Commission considered the burden of filling out an application form to obtain an access code to be minimal. *Id.* at 2724 n. 24. It was not persuaded that the alleged reluctance of adults to disclose their identity to adult message providers made the access code plan intrusive. The Commission said:

> Such disclosure is already undertaken when persons call live adult services and pay by credit card. We have not been informed that this method of payment has had any stifling effect on live adult message services. Disclosure of identity is also already entailed in normal billing operations by carriers for calls to public announcement service numbers. We additionally note that any disclosure encompassed in an

> access code system is not required to the government but to private interests who have invited callers to enter into a voluntary commercial transaction. Thus, the alleged reluctance of adults to disclose their identity arises from concerns relating to the commercial interests to whom the disclosure is made. In any event, we believe that these concerns are within the ability of the message provider to control or ameliorate by assurances of, and actual responsible use of, information obtained from callers.

Id.

The Commission also added scrambling as an available defense citing AT&T's figures that scrambling devices cost between $150 to $2,500 and descrambling devices cost approximately $15. *Id.* at 2720 para. 41. It suggested that "the message provider could use sale of descramblers as an additional business opportunity." *Id.* The Commission concluded that scrambling was less expensive than customer premises blocking and that the cost would be acceptable to message sponsors and their customers. *Id.* It observed that the regulation's effectiveness depended on a ban on sales of descramblers to minors. It urged states to amend existing regulations governing the sale of adult products to minors to prohibit the sale of descramblers to minors. *Id.* at 2722 para. 46. It suggested that all adult message providers adopt a uniform method of scrambling and directed AT&T to submit complete technical specifications for its scrambling product. *Id.* at 2722 para. 48.

The Commission concluded that billing notification would not by itself be an effective method of implementing section 223(b). *Id.* at 2721 para. 42. However, it found no feasibility or cost problems associated with billing notification for AT&T's 900 service. *Id.* at 2721 para. 44. Consequently, it announced an additional requirement that AT&T 900 service providers request billing notification as a prerequisite to obtaining a defense

to prosecution. *Id.* at 2722 para. 47. The Commission directed AT&T to file appropriate tariff provisions providing for identification of calls to adult message sponsors on its dial-it service.[3] *Id.*

The petition to review followed.

DISCUSSION

We reiterate the legal standard for analyzing the FCC's dial-a-porn regulations set forth in *Carlin I*, 749 F.2d at 121, quoted in *Carlin II*, 787 F.2d at 855:

> because the regulation is content based—it does not apply to all dial—it services, but only to those transmitting obscene or indecent messages—we scrutinize it more closely.
>
> Under this more exacting scrutiny, we must determine whether the regulation precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. Such an interest must be served, however, only by "narrowly drawn regulations," that is, by employing means "closely drawn to avoid unnecessary abridgment." The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression. And the State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.

(Footnote and citations omitted.) *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47. 106 S.Ct. 925, 928,

---

[3] AT&T has not taken any appeal so far as our record shows.

89 L.Ed.2d 29 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

The statute and the regulation were designed to protect minors from obscene speech, *see, e.g.*, 129 Cong. Rec. S16,866 (daily ed. Nov. 18, 1983) (statement of Sen. Trible); 52 Fed.Reg. at 17,760, which is a compelling government interest. *See Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968); *Carlin I*, 749 F.2d at 121. As a preliminary matter, we find that the record supports the FCC's conclusion that a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way to serve this compelling state interest.

In concluding that access codes were feasible in the NYNEX region, the Commission relied upon NYNEX's assertion that its replacement system will be able to provide two-way communication by mid-1988 and the assumption that the Varick Cut-Thru system is capable of handling adult entertainment services until then. The Commission noted that although under this approach, providers would incur estimated additional one-time charges of up to $73,000, and monthly recurring charges of up to $12,000, "[a]dult message sponsors have failed to provide any cost data suggesting that these costs are unreasonable in relation to the revenues obtained from adult message services provided over carrier public announcement offerings." 2 FCC Rcd at 2724 n. 23. In establishing scrambling as an alternative defense, the Commission reversed its decision issued in the Second Report and Order rejecting the method. 50 Fed. Reg. at 42,704 paras. 21-22. An agency may change its policies or regulations provided it supplies reasoned analysis explaining the change. *Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977). Here the Commission initially believed that descramblers had to be installed at the customer's premises. It was concerned that this would impose a burden on customers and prevent adults from obtaining access to the recorded messages from coin-operated or pay telephones not equipped with decoding devices. 50 Fed. Reg.

at 42,704 para. 22. AT&T's comments in the present proceedings describe, however, a portable battery-operated descrambling device. It requires no installation and is simply held against the receiver's earpiece. The Commission reasonably concluded that "while scrambling would be effective at all locations, use of an inexpensive portable device would permit access by adults from virtually any telephone including pay telephones." Third Report, 2 FCC Rcd at 2725 n. 25. Of course, non-portable devices could be used in the home if desired. We agree with the Commission that the message provider could use sale of descramblers as an additional business opportunity. Fifteen dollars does not seem like an excessive cost when one considers prices for other forms of entertainment in this day and age. We conclude that the Commission provided a reasonable analysis explaining its decision to add scrambling as an optional defense.

The Commission bore its burden of showing that the compelling government interest in protecting minors from obscene telephone messages could not be served by less restrictive means. It adequately considered the feasibility and costs of customer premises blocking equipment. Given reports that the cost of a device which could block outgoing calls or otherwise terminate a call to adult message providers ranged from $5 to $89, it reasonably assumed that $25 would be the average cost per household. It noted that providers would potentially be required to supply customer premises blocking devices to the entire country as section 223 envisions procedures that restrict *interstate* access to adult messages. In light of its determination that the devices could be easily disabled by minors and that they nevertheless blocked some calls by adults, the Commission reasonably concluded that the high cost associated with customer premises blocking was not justified.

Theoretically, a beep-tone device, suggested by the Media Law Clinic of New York Law School and qualifiedly supported by three telephone companies, would avoid the problems associated with access codes and scrambling, at a relatively low cost for providers and customers. The Commission observed that since it had not been shown that a significant percentage of households would use this beep-tone device, the device would not be effective in achieving the purposes of section 223, a

conclusion having little or no evidentiary support in the record. However, as the Commission noted, the beep-tone device has not actually been manufactured, even in prototype. As some carriers raised questions concerning its technical feasibility, the Commission held that "substantial limitations exist with establishment of this device as a regulatory requirement *at this time*." 2 FCC Rcd at 2724 n. 13 (emphasis added). When such a device or any other less restrictive technology becomes available, we direct the FCC to reopen its proceedings to consider the costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its "heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." *Carlin I*, 749 F.2d at 121.

Of course, even the least restrictive means of regulation must be reasonable as assessed by balancing the limits on free speech against the benefits of the regulation. Here, the alternatives offered to the providers do not unreasonably restrict adults' access, especially given the proviso that the proceedings will be reopened if a beeper device or any other feasible and effective method becomes available that is less restrictive to adults' access. The FCC regulations are analogous to the requirements that sexually oriented materials be displayed behind blinder racks, *M.S. News Co. v. Casado*, 721 F.2d 1281, 1287 (10th Cir.1983), or be kept in sealed wrappers behind an opaque cover or in a separate adults-only section of the book store. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1390-01 (8th Cir.1985) (amended 1986). In each case adults continue to have access to the materials, with minimal inconvenience, while minors' access is restricted. *But see American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 696(4th Cir.1986), *prob. juris. noted*, ____ U.S. ____, 107 S.Ct. 1281, 94 L.Ed.2d 140 (1987). No censorship of the content is involved.

Petitioners argue that the FCC regulations and, in particular, the written application required for obtaining an access code, impermissibly chill the First Amendment rights of adults wishing

to receive sexual messages over the telephone. They suggest that many adults will not exercise their First Amendment rights because they fear that the Government can discover their identities by using its subpoena power to obtain the providers' records.[4] This argument essentially claims that the regulation even if valid as applied to Carlin is overbroad because it affects others not before the court. The traditional rule is that a party to which a statute may be applied constitutionally may not facially challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113 (1982). The First Amendment overbreadth doctrine is an exception to this principle. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-13, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). However, the overbreadth doctrine is "strong medicine," employed "only as a last resort." *Id.* at 613, 93 S.Ct. at 296. Thus, the overbreadth must be "substantial" before the statute involved will be invalidated on its face. *Ferber*, 458 U.S. at 769, 102 S.Ct. at 3361. The possibility that at some point the Government might obtain the names of the recipients of obscene telephone messages by subpoena is not sufficiently substantial. Despite what we said about "potential chilling effect" in *Carlin II*, 787 F.2d at 856 n. 7, neither *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), nor *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), is implicated. *Talley* involved revealing the names of all persons who wrote or distributed handbills to the public at large. 362 U.S. at 60-61, 80 S.Ct. at 537. *NAACP* involved disclosing names of members of an organization to a state government in a state where such exposure had led to "economic reprisal, loss of employment,

---

[4] Lending weight to Carlin's argument is the fact that the United States Attorney for the District of Utah, after obtaining indictments charging Carlin, two of its officers, an employee, and an actress with violating 47 U.S.C. § 223(a) and 18 U.S.C. §§ 1462 and 1465, attempted to subpoena records both from Carlin and from Mountain Bell concerning the identity of persons who voluntarily accessed Carlin's message service in New York. The indictments were later dismissed. *United States v. Carlin Communications, Inc.*, 815 F.2d 1367 (10th Cir.1987).

threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462, 78 S.Ct. at 1172. Here, as the Commission pointed out, disclosure would only be to private interests who have invited callers to enter into a voluntary commercial transaction. Third Report, 2 FCC Rcd at 2724 n. 24.

Having found the regulations valid,[5] we must now address the constitutionality of the underlying statute, 47 U.S.C. § 223(b). Carlin argues that the statute is unconstitutionally defective in four ways: first, by its vagueness and overbreadth; second, because it violates due process; third, because it creates an impermissible national standard of obscenity; and fourth, because it constitutes an unconstitutional delegation of authority to the Commission.

As a preliminary matter, we note that we must construe the statute to avoid constitutional problems if it is susceptible to such a limiting construction. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 297, 76 L.Ed. 598 (1932). *See also Lowe v. SEC*, 472 U.S. 181, 206 n. 50, 105 S.Ct. 2557, 2571 n. 5, 86 L.Ed.2d 130 (1985) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 697, 104 S.Ct. 3262, 3292, 82 L.Ed.2d 487 (1984) (Stevens, J., concurring in part and dissenting in part) ("In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always [*sic*] sworn to protect the Constitution, would [*sic*] err on the side of fundamental constitutional liberties when its legislation implicates those liberties.")).

Carlin's first argument is that the statutory language, "obscene or indecent," is vague and overbroad. The statute as originally proposed by Rep. Thomas J. Bliley, Jr., and as adopted by the Committee on Energy and Commerce used the words "obscene, lewd, lascivious, filthy, or indecent." H.R. 2755 § 8(b)(1)(A),

---

[5] We are also unpersuaded by Carlin's contention that the regulatory system now in place is an impermissible taking of Carlin's property in violation of the Fifth Amendment. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-28, 98 S.Ct. 2646, 2659-61, 57 L.Ed.2d 631 (1978); *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 669, 93 L.Ed.2d 721 (1986).

reprinted in H.R. Rep. No. 356, 98th Cong., 1st Sess. 3 (1983), 1983 U.S.Code Cong. & Admin.News 2219. Rep. Bliley later accepted and cosponsored a Judiciary Committee amendment evidently engineered by Rep. Robert W. Kastenmeier omitting the words "lewd, lascivious, filthy," on the following basis:

> This change is merely to clarify that Congress intends to be consistent with Supreme Court rulings on obscenity which require a violation of community standards and an appeal to prurient interests. In *Manual Enterprises v. Day*, 370 U.S. 478 [82 S.Ct. 1432, 8 L.Ed.2d 639], Justice Harlan observed that though words such as these have different shades of meaning in common usage, they are all aimed at obnoxiously debasing portrayals of sex. Therefore, it is not necessary to keep the litany of terms as currently in the statute to prohibit that kind of material. It was necessary, however, to maintain the term "indecent" since the Supreme Court upheld the FCC's assessment of a fine based on indecent material in the Pacifica case.
>
> I would observe as an aside that the ruling in Pacifica clearly affirms the FCC's ability and authority to examine material to determine whether it is obscene or indecent and to assess fines on that basis. This amendment clarifies that question and obviates the need for the FCC's pending inquiry on that issue, though I believe it was absurd for the FCC to ever consider their authority in that area questionable, based on Pacifica.

129 Cong.Rec. H10,559, H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley). *See also* 129 Cong.Rec. E5,966-67 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier).[6]

---

[6] "[T]he amendment deletes the terms "lewd, lascivious, filthy" from the bill, in accordance with Supreme Court cases limiting the regulation of speech to obscene or indecent language to the extent such regulation is permitted by the Constitution. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Miller v. California*, 413 U.S. 15, 93 S.Ct.

(Footnote Continued)

The use of "indecent" was clearly made with *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), in mind. *Pacifica*, of course, held that, pursuant to 18 U.S.C. § 1464 (1976), the Commission could regulate "a radio broadcast that is indecent but not obscene." *Id.* at 729, 98 S.Ct. at 3030. The broadcast, entitled "Filthy Words," had used, according to the Commission, "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 732, 98 S.Ct. at 3031 (quoting 56 F.C.C.2d 94, 98 (1975)). The Court noted that the statutory language of 18 U.S.C. § 1464, "obscene, indecent, or profane," was "written in the disjunctive, implying that each has a separate meaning." *Id.* at 739-40, 98 S.Ct. at 3035. The Court went on to cite cases construing similar disjunctive terminology, "obscene, lewd, lascivious, indecent, filthy or vile," as limited to obscenity as defined in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and its predecessors.[7] *Pacifica*, 438 U.S. at 740, 98 S.Ct. at 3035

2607, 37 L.Ed.2d 419 (1973). Thus, an earlier case cited by Mr. Bliley, *Manual Enterprises v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), was decided without the benefit of more recent Supreme Court refinements of first amendment protections and, therefore, reference to that case does not authorize the Federal Communications Commission to regulate beyond constitutional boundaries."

129 Cong.Rec. E5,966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier).

[7] In *Miller* the Supreme Court explained that before material may be found to be unprotected obscene speech, the trier of fact must conclude that:

> "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .[;] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted). The Court further observed that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. . . ." *Id.* at 27, 93 S.Ct. at 2616.

(discussing *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7, 93 S.Ct. 2665, 2670 n. 7, 37 L.Ed.2d 500 (1973) (dicta); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482-84, 82 S.Ct. 1432, 1434-35, 8 L.Ed.2d 639 (1962) (Harlan, J.)). Pointedly the *Pacifica* Court noted that "[i]n *Hamling* . . . by reading into [18 U.S.C. § 1461] the limits set by *Miller v. California*, *supra*, the Court adopted a construction which assured the statute's constitutionality." *Pacifica*, 438 U.S. at 740, 98 S.Ct. at 3035. The *Pacifica* Court distinguished section 1464, the statute concerning public broadcasting, from the statute in *Hamling* "deal[ing] primarily with printed matter enclosed in sealed envelopes mailed from one individual to another," and held that Congress could regulate indecent but not obscene speech when transmitted in broadcasts but not when sent through the mail. *Id.* at 741, 98 S.Ct. at 3036.

The *Pacifica* Court declined to endorse the Commission definition of what was indecent, saying instead:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303. We simply

> hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

438 U.S. at 750-51, 98 S.Ct. at 3041 (footnote omitted). Justice Powell's concurring opinion which gave the Court a majority also emphasized that the Court's holding was confined to the facts. "The Court today reviews only the Commission's holding that [George] Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion." *Id.* at 755-56, 98 S.Ct. at 3043 (Powell, J., concurring).

As we noted in *Carlin I*, the Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), emphasized the narrowness of the *Pacifica* holding.

> *Bolger* thus single[d] out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication."

749 F.2d at 120 (quoting *Bolger*, 463 U.S. at 74, 103 S.Ct. at 2884). Thus the Court struck down as unconstitutional a law regulating mailings advertising birth control, a law which supporters argued protected children from exposure to sexually explicit offensive material. *Bolger*, 463 U.S. at 71, 103 S.Ct. at 2883. The Court noted that "[t]he receipt of mail is far less intrusive and uncontrollable," *id.* at 74, 103 S.Ct. at 2884, than broadcasting. For similar reasons, some courts have struck down legislation limiting adult access to indecent speech on cable television. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir. 1985); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 48 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982). The Eleventh Circuit distinguished cable television from radio broadcasting because cable subscribers must affirmatively subscribe to the service and because technology exists to enable parents to prevent children's

access to objectionable cable programs. *Cruz*, 755 F.2d at 1420. For some of the same reasons, telephone calls made by an individual over a private line differ significantly from the public broadcast in *Pacifica*. *See Carlin Communications, Inc. v. Mountain State Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987); Note, *Telephones, Sex, and the First Amendment*, 33 U.C.L.A.L.Rev. 1221, 1243-46 (1986). We conclude that the *Pacifica* decision does not justify the regulation of indecent telephone messages.

Pacifica did *not* decide that the indecent broadcast "would justify a criminal prosecution." 438 U.S. at 750, 98 S.Ct. at 3041. Here the statute specifically authorizes prosecution. Were the term "indecent" to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional. Congress clearly wanted to regulate adult telephone messages only so far as was constitutional. The House Energy and Commerce Committee report emphasized that "[t]he Committee intends that enforcement of this section be consistent with Supreme Court rulings on obscenity." H.R.Rep. No. 356, 98th Cong., 1st Sess. 19, *reprinted in* 1983 U.S. Code Cong. & Admin.News 2219, 2235. Sponsors of the legislation, including Representatives Bliley and Kastenmeier, stressed that the lesiglation regulate obscenity within constitutional boundaries. *See, e.g.*, 129 Cong. Rec. E5,966-67 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier).[8] But even if we incorrectly interpret congressional

---

[8] "I would like to take issue with the restrictive interpretation by my colleague of the regulations to be issued by the FCC under section 223(b)(2) of my amendment. As noted in my own earlier remarks:

> Congress intends that the FCC promulgate reasonable time, place, and manner restrictions calculated to restrict access to prohibited communications by persons under 18 years of age.

Under the Supreme Court's holding in *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), Congress cannot expect the FCC to impose blanket restrictions on dial-a-porn services if time, place, and manner restrictions are technically infeasible or impracticable. In Butler, the Supreme

(Footnote Continued)

intent, the words "or indecent" are separable so as to permit them to be struck and the statute otherwise upheld. *See Regan v. Time, Inc.*, 468 U.S. 641, 652-53, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). As the Court there noted:

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' "

Id. at 653, 104 S.Ct. at 3269 (citations omitted). Using this standard we believe the invalid part of section 223 may be dropped and that the remainder of the statute is fully operative.

We are also unpersuaded by Carlin's remaining facial constitutional challenges to section 223(b). The statute does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, *Smith v. United States*, 431 U.S. 291, 304, 97 S.Ct. 1756, 1766, 52 L.Ed.2d 324 (1977) (18 U.S.C. § 1461); *Hamling*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (same), or the broadcasting of obscene messages. *Pacifica*, 438 U.S. 726, 98

Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials judged to have a potentially deleterious influence on children. Id. at 382-83, 77 S.Ct. at 525. The Court explained that the statute would have reduced the adult population to reading only what was fit for a child. Id. at 383, 77 S.Ct. at 526. The principle is equally applicable here, and so we have carefully constructed section 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that permit adult access while limiting children's access. If, however, no such regulations are feasible, then less restrictive measures rather than broader restrictions will have to suffice to avoid any constitutional infirmity."

129 Cong.Rec. E5,966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier). *See also* note 6 *supra*; 129 Cong.Rec. S16,866 (daily ed. Nov. 18, 1983) (statement of Sen. Trible).

S.Ct. 3026, 57 L.Ed.2d 1073 (18 U.S.C. § 1464). True, telephone messages differ from mailings and broadcastings because the caller rather than the provider controls where the message is received. Individuals can access adult telephone messages from anywhere in the country, potentially subjecting the providers of such messages to suit in any district. While we are sympathetic with the argument that providers, to avoid liability, may be forced to comply with the most stringent local obscenity standard, that is a matter for resolution only if and when the statute is challenged as applied.

Carlin's third argument that section 223 violates due process by authorizing the Commission to prosecute, adjudicate, and punish alleged violations is premature. *See Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 26 (2d Cir.1984). Carlin's final argument that the statute unconstitutionally delegates legislative authority to the Commission is unavailing. Congress may validly provide a criminal sanction for violation of rules or regulations which it has empowered an administrative agency to promulgate if such delegation of authority is accompanied by sufficient guidelines and standards for the exercise of the authority. *See United States v. Davis*, 564 F.2d 840, 843-44 (9th Cir.1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 733, 54 L.Ed.2d 760 (1978).

Petition to review denied; mandate stayed for ninety days to permit parties and intervenors to comply with Commission regulations.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 83-989

In the Matter of

Enforcement of Prohibitions
Against the Use of Common
Carriers for the Transmission
of Obscene Materials

THIRD REPORT AND ORDER

Adopted: April 16, 1987; **Released: May 4, 1987**

By the Commission:

1. In *Third Notice of Proposed Rule Making*, Gen. Docket No. 83-989. 51 Fed. Reg. 26,915 (July 28, 1986), the Commission solicited additional public comment on proposals to implement Section 223(b) of the Communications Act by establishing methods to restrict access by minors to obscene or indecent messages provided by telephone. Comments and/or reply comments were filed by the NYNEX Telephone Companies (NYNEX), Pacific Bell, the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), Southwestern Bell Telephone Company (Southwestern Bell), Bell South Corporation (BellSouth), the American Telephone and Telegraph Co. (AT&T), Contel Service Corporation (Contel), the United States Telephone Association (USTA), Urix Corporation (Urix), the American Civil Liberties Union (ACLU), the Attorney General of the State of Minnesota (Minnesota), the District of Columbia Public Service Commission (DCPSC), the Media Law Clinic of the New York Law School (Media Law Clinic), Phone Programs, Inc. (Phone Programs), Omniphone, Inc., Tele-Star Productions and McLinn Industries, Inc. d/b/a Telephone Communications (Omniphone, et al.), and Carlin Communications, Inc. (Carlin).[1] As is further explained below,

we are reestablishing access codes as an acceptable method of restricting access by minors to obscene or indecent telephone message services for all areas of the country. We additionally require message sponsor providers of obscene or indecent messages over AT&T's Dial-It 900 service wishing to obtain the defense to prosecution set forth in Section 223(b) of the Communications Act to request from AT&T that calls to such message services be subject to billing notification.

BACKGROUND

2. Section 223(b) of the Communications Act makes it unlawful, *inter alia*, to transmit to any person under eighteen years of age obscene or indecent messages by means of a telephone or any telephone facility. (In this decision, we will refer to obscene or indecent messages as adult messages.) Section 223(b)(2) provides that it will be a defense to prosecution if the provider of adult messages restricted access to the prohibited messages to adult in accordance with procedures established by the Commission.[2] In *Report and Order*, 49 Fed. Reg. 24,996 (June 19, 1984), the Commission determined that the adult message provider would be eligible for the defense to prosecution contemplated under Section 223(b)(2) if the message provider operated only between the hours of 9:00 PM and 8:00 AM Eastern Time, or required payment by credit card prior to transmission of the message. The Commission reasoned that this would restrict access by minors to adult message services because for the most part only adults would have credit cards and that during late night hours minors normally would be adequately supervised by adults in the home. In *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (*Carlin I*) the court reviewing this regulation set forth the legal standards under which the Commission's efforts to implement Section 223 would be evaluated. The court stated:

> because the regulation is content based—it does not apply to all dial-it services, but only to those transmitting obscene or indecent messages—we scrutinize it more closely.

> Under this more exacting scrutiny, we must determine whether the regulation precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. Such an interest must be served, however, only by "narrowly drawn regulations," that is, by employing means "closely drawn to avoid unnecessary abridgement." The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression. And the State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.

749 F.2d at 121. Under this standard, the court invalidated the time of day restriction finding that the Commission had rejected alternatives without providing a comprehensive record demonstrating that they neither effectively controlled minors' access to adult message services, nor were less restrictive of adults' ability to hear the recordings than the regulation issued. The court did not invalidate the credit card option, nor did it address the constitutionality of Section 223.

3. In a *Second Notice of Proposed Rule Making*, 50 Fed. Reg. 10,510 (March 15, 1985) the Commission sought to remedy the defects in the record by soliciting comments on four general approaches of restricting access by minors to adult message services: screening and blocking, access and identification codes, limiting operational hours of service, and billing notification. In its *Second Report and Order*, 50 Fed. Reg. 42,699 (October 22, 1985) the Commission concluded that the most effective means of restricting access by minors to adult message services while at the same time minimizing restrictions on the rights of adults was to require message providers to transmit messages only after ascertaining that the caller was an adult through an access code or personal identification number system, or, to require

payment by credit card before transmission of the adult message. The Commission required that access codes be assigned by the message provider through a written application procedure under which the age of the applicant could be reasonably ascertained.

4. The Commission's access code regulation was appealed by two affiliated adult message providers operating in areas served by the New York Telephone Company.[3] In *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (*Carlin II*), the reviewing court stated that under the standard it had enunciated in *Carlin I* it was "not yet convinced that the regulation was chosen with the appropriate constitutional structures in mind . . ." 787 F.2d at 847. "[W]e think the Commission has failed adequately to consider the feasibility of shifting the cost of customer premises blocking equipment to the providers of services and/or the telephone companies that gain income from the calls. On the record before us, it may well be that the least restrictive means for complying with the congressional mandate lies in this now plainly feasible device available from various manufacturers." 787 F.2d at 855. The court remanded to the Commission "for exploration of the alternative of shifting the cost of customer premises blocking equipment to service providers and/or telephone companies." 787 F.2d at 856. The court further stated that the access code regulation was clearly arbitrary and capricious with respect to areas served by the New York Telephone Company because the public announcement system provided by that carrier is a one-way non-interactive system making it infeasible, according to the court, to implement an access code system. (A two-way capability is necessary for implementation of an access code system in order for the caller to transmit to the information provider his personal identification number.) The court stated that its decision applied only to Carlin and the New York Telephone Company system. The access code regulation is therefore in effect in other areas of the country. *See* Public Notice, No. 4315, May 6, 1986.

5. In response to *Carlin II*, the Commission issued its *Third Notice of Proposed Rule Making*. 51 Fed. Reg. 26,915 (July 28, 1986). The Commission solicited comment on the methods of implementing an access code system in the New York Telephone

Company service area. The Commission requested comment on the possibility of implementing access codes without two-way communication between the information provider and the customer and also on using New York Telephone Company facilities at its Varick Street station which were apparently modifiable in ways to create a two-way capability. The Commission further requested comment on the possibility of fulfilling the mandate of Section 223 by customer premises blocking equipment, as suggested by the court, and also on potential use of scrambling techniques. The Commission stated that comments should be fully cost supported. The Commission also requested comment from telephone companies concerning the scope of telephone subscribers' rights to obtain from the carrier the identity and address of adult message providers.

6. Adult telephone message services are provided in several ways. Some providers employ persons to speak to callers on a live basis. For such services, payment by the caller would normally be by credit card. In addition, the caller would pay the normal charge imposed by the carrier for transmission of the call. This would be the normal charge for local calling, or an interstate charge if the call were made on an interstate basis. In addition, adult message providers are customers of carrier public announcement services.[4] Public announcement services provided by exchange carriers are local communications offerings tariffed at the local level. Under this service, the caller will be billed by the carrier the tariffed rate for the public announcement call. A portion of these charges are then remitted to the message sponsor. Under the public announcement offering of the New York Telephone Company, the caller will pay on average 17 cents per call, depending on the time of day of the call, and the message sponsor will receive from the carrier 2 to 2.5 cents per call depending on the volume of calls received. *See* New York Telephone Company Tariff P.S.C. No. 900 Section 13, Part G, Downstate Dedicated Mass Announcement Network Service. In other public announcement offerings the message sponsor may determine the amount the caller will be charged. For example, under the public announcement service provided by Pacific Bell, the message sponsor may select for a sixty second message charges between 20 cents and $2.00 per call. For a $2.00 call the message

sponsor will receive $1.50, for a 20 cent call, 1 cent. *See* Pacific Bell Tariff, Schedule Cal. P.U.C. No. A9, Public Announcement Services, effective April 18, 1985, Section 9.5.

7. Interstate transmission of adult messages may occur in two ways.[5] First, a locally provided service can be called on an interstate basis, *e.g.*, a caller in the District of Columbia could call an adult message service provided over a public announcement service tariffed in California. (The caller dials the area code and the local number of the adult message service.) In such a case, the caller will pay only the normal charge assessed by the interexchange carrier for the interstate call: he will not pay any locally tariffed public announcement charge. This is because there is currently no billing arrangement between carriers for collection of the public announcement charge when the local service is accessed on an interstate basis.

8. In addition, interstate transmission of adult messages may occur over AT&T's public announcement service tariffed at this agency.[6] This is referred to as "Dial It" 900 service. This is an interstate service which can be accessed from essentially anywhere in the country by dialing the 900 number assigned to the message provider.[7] Under this service offering the caller will pay 50 cents for the first minute and 35 cents for each additional minute.[8] The message sponsor will receive from 2 to 5 cents per call or per additional minute depending on the total volume of calls (the higher the volume of calls the greater the compensation to the message provider.) There is additionally a 2000 per day call or call-minute minimum: the message sponsor is required to pay 25 cents for each call or call-minute per day below the minimum. *See* AT&T Tariff F.C.C. No. 1, Section 5.1, Dial it 900 Service.

9. The comments received in response to the *Third Notice of Proposed Rule Making* indicate that calling volume to adult message services, while substantial, may be declining. NYNEX reports that adult entertainment calling since 1983 has declined from 176,648,557 calls in 1983 to 70,762,393 in 1985. Adult entertainment calls as a percentage of all public announcement calls has decreased from nearly forty percent in 1983 to approximately thirteen percent in the first seven months of 1986, reports NYNEX.

4,802,693 adult entertainment calls were made on the NYNEX system in July 1986.

COMMENTS

10. With respect to the existing access code requirement and its implementation, NYNEX states that it is planning to replace its existing one-way public announcement system with a two-way system in 1988. It states that there is no equipment currently in service anywhere that could provide advanced capabilities sought to be achieved in its replacement system that can accommodate the extremely high calling volumes experienced on its public announcement system. Modifying its existing system, although technically feasible, would be time-consuming and costly. The system of one manufacturer could not be implemented before mid-1987, would cost $21,500,000, and then would in any event be replaced in 1988 by its new system, states NYNEX. This makes modification of its existing system to achieve two-way capability unwarranted, according to NYNEX. Rather, full two-way capability over its public announcement system should await its more advanced replacement system.

11. However, interim access code capability could be provided over its Varick Street, Manhattan, states NYNEX. Public announcement service has been provided over the Varick Street switch since July 1986, in order to meet demand by public announcement information providers. While the Varick Street public announcement service is also one-way, it is provided at a single switching center, unlike the rest of its public announcement service which uses subcenters. The Varick Street facilities additionally would allow a connection to be made after a call has been identified as a call to a particular public announcement number. These differences make possible a two-way capability over the Varick Street facilities without extensive modification, states NYNEX. There are two possible methods of modifying the Varick public announcement system to achieve this result, "cut-through" and "I.P. Authorization". Under a "cut-through" approach calls would be sent directly to the message provider's premises both for verification of the access code and transmission of the message. Under this approach it would be necessary for the message provider to install at his premises

verification and message transmission equipment and to subscribe to sufficient circuits to handle the anticipated calls, one circuit for each call unless the message provider could create multiple simultaneous connections. The additional circuits could be provided in one to three months, states NYNEX. Fifty to one hundred four mile long additional circuits, for example, would cost the message provider $6,000 to $12,000 in recurring monthly charges, and nonrecurring initial charges of $36,000 to $73,000, estimates NYNEX.

12. Under an "I.P. Authorization" method of providing two-way capability over the Varick Street facilities, the message would be sent from the carrier's facilities only after receiving an authorization from the message provider. Calls would be connected to the message provider only long enough for transmission and verification of the access code, and switched back to the carrier for transmission of the message. Thus, under the I.P. Authorization approach it would not be necessary for the information provider to obtain multiple circuits or provide message transmission equipment. However, the Provider Identification Control Circuit, which would transmit the call for verification to the message provider and then connect the caller to the message at NYNEX's Varick Street public announcement facilities, would have to be designed and manufactured and this would require 9-12 months and $2,400,000, according to NYNEX. These limitations make it inferior to the cut-through approach to obtaining an interim two-way capability, contends NYNEX. Both the cut-through and I.P. Authorization methods would require use of a 970 prefix telephone number by the adult message sponsor instead of current 976 prefix numbers.

13. AT&T points out that its public announcement service does not have a two-way capability. However, it indicates that message providers would be able to obtain a two-way capability by purchasing voice grade access to each of its six public distribution centers from personal identification number verification equipment located at premises in proximity to each subcenter. AT&T estimates that the cost to the message provider of additional communication services necessary to achieve a two-way interactive capability on 900 service would be $170,000 in non-recurring

charges and $20,000 in monthly recurring charges. In addition to these costs for tariffed communications services, the message provider would need to obtain at its expense premises near the six public distribution centers and verification equipment at each such location. AT&T estimates that verification equipment and associated software would cost the message provider approximately $82,000. AT&T did not inform the Commission of any plans or intention to provide a two-way interactive capability on its 900 service. It states that there is no economically practical method of providing personal identification number verification on non-interactive systems such as its 900 service other than by provision of special interactive arrangements by the message provider.

14. Ameritech states that its current public announcement services are non-interactive but that it will be two-way by September 1987. Bell Atlantic points out that the public announcement service provided by New Jersey Bell Telephone Company is similar to that currently provided by New York Telephone Company. It states that it would cost $3,500,000 to convert that system to a full two-way capability, but that it has no plans to do so, since New Jersey Bell's total public announcement revenues for 1985 were $5,100,000. It states that its other public announcement services are two-way and establish a direct two-way link between the end user and the service provider. Because the recording and playback devices are on the provider's premises, it is possible for the provider to insert an access code verification system so that only authorized users will hear the message, states Bell Atlantic. Bell Atlantic states that it has also developed a billing option whereby the caller will not be billed for the call unless he remains on the line for more than 10 or 20 seconds. This option is currently in effect in Maryland in order to accommodate access code systems, states Bell Atlantic. It states that access code systems are an effective way of restricting minors' access to adult message services and should be required of message providers where the carrier provided a two-way system.[9] Southwestern Bell states that the access code regulation can be implemented by message sponsors in all of its service territories using existing facilities. Pacific Bell states that its public announcement services are two-way.

15. Omniphone, a subscriber to carrier public announcement services and a provider of some adult message programming, states that the present access code requirement is unworkable, and will only serve to deprive adults of adult programming. It states that it has had experience with two programs which required the caller to lower in part the curtain on anonymity. Both programs failed, states Omniphone. Analysis revealed, according to Omniphone, that callers are not willing to identify themselves. It believes that callers are concerned about abuse of information by message providers, as distinct from carriers.

16. Apart from use of access codes to restrict access by minors to adult message services, carriers, message providers, and equipment manufacturers filing comments have made varying recommendations concerning additional possibilities for restricting access by minors to adult message services. The carriers urge that a "multiple defense" or "menu" approach be adopted. AT&T contends that scrambling of adult messages should be added to the current options of access codes and requiring payment by credit cards. NYNEX contends that scrambling, and submission for Commission review and approval of individual message provider proposals be adopted. Scrambling and use of CPE blocking devices should be added as defenses, contends Ameritech. Southwestern Bell urges addition of scrambling and use of a type of CPE device that would terminate calls to adult message providers. Bell Atlantic contends that access codes should be required where feasible, and other defenses be permitted in hierarchical manner with the most effective required first. Pacific Bell, on the other hand, contends that only the current options should be permitted because other options are either ineffective (CPE blocking) or unconstitutional (scrambling). The ACLU contends that Section 223 is unconstitutional, that the access code requirement should be rescinded, but that a CPE blocking approach or scrambling would be less burdensome. Carlin Communications states that the only constitutional method of implementing Section 223 would be for message providers to insert a warning message to minors combined with itemization and identification on telephone bills that particular calls were to adult message services.

17. With respect to the use of CPE blocking devices, AT&T states that these devices would be ineffective and difficult to

implement.[10] Because not all households would use such devices, there would continue to be access by minors to adult message services, according to AT&T. Similarly, states AT&T, public coin telephones might not be equipped with these blocking devices. To prevent all calling to adult messages from a residence, blocking devices would need to be placed on every telephone or at the demarcation point between customer and carrier wiring. Installation at this point could be difficult for some customers, states AT&T. Programming devices to include all adult message numbers could also be daunting or impossible, according to AT&T, since there are many such numbers, they change frequently, and there is no readily available source for all such numbers. AT&T also points out that CPE devices would impose costs of restricting access by minors to adult message services on other than message providers. Such devices range in price from $10.00 for lock sets to $50.00 to $100.00 for more sophisticated programmable devices. AT&T states that local carrier charges for installation of such devices would be approximately $20-$25 per installation. Bell Atlantic states that it is aware of several devices which would provide blocking. It knows of one such device, for example, which costs $89.95 and can block ten numbers. Pacific Bell, however, states that there is no feasible means of CPE blocking. It states that it has been unable to find a technologically adequate CPE device. It states that deficiencies of tested models were ease of potential disconnection by minors, network incompatibility and insufficient capacity to program the numbers of all adult message providers.

18. CPE devices are the answer to restricting access by minors to adult messages, states Omniphone. It states, however, that message providers are not in a position to administer provision of such devices, although they could help in financing such devices. It states that the cost could be jointly met by carriers and message providers, although such devices should not be free to persons requesting them. It notes that carriers should be able to achieve economies of scale in obtaining large numbers of such devices.

19. The ACLU states that the concerns expressed by the Commission and others on the ability of consumers to use and install CPE blocking devices is unfounded in that other CPE is successfully used by consumers. Installation charges, states the

ACLU, should not in any event exceed $25.00. It states that the modest costs of obtaining and installing such CPE should be borne entirely by parents. Message providers are not financially able to pay for such equipment, contends the ACLU.[11] While difficult questions of allocation would arise, imposing some costs on carriers would be preferable to placing it on message providers. The ACLU states that if the Commission adopts a blocking approach, message providers would have an incentive to maintain and provide lists of adult message services so that such CPE could be used effectively. Other concerns expressed by the Commission concerning CPE blocking might be alleviated by modifications to the CPE approach, suggests the ACLU.

20. NYNEX states that any attempt to allocate costs of customer premises blocking equipment to message providers or carriers, as suggested by the court in *Carlin II*, would raise a host of practical problems. For example, according to NYNEX, how would costs be allocated between message providers, and what would be the mechanism for collecting the subsidy especially if the message provider is in one state and the subscriber wishing to use blocking CPE is in another state. NYNEX questions whether costs would be allocated to the originating or terminating carrier or the interexchange carrier. NYNEX suggests that a subsidy for purchase of CPE blocking might cause subscribers to request such devices even though they might not intend to use them for blocking calls to adult message providers. This might lead to excessively burdensome costs to message providers and carriers, states NYNEX. NYNEX further suggests that prior to directing any subsidy for the provision of CPE blocking that the Commission should examine the effect on competition of subsidized provision of CPE.

21. Ameritech states that it commissioned a survey of households with children under eighteen years of age to ascertain what the demand for CPE blocking devices would be. It reports that when price was not mentioned approximately seventy percent of households were interested in a device or service that would block calls to adult message services. However, if required to pay 75 cents per month for a blocking capability,

only three to five percent of households stated they would definitely purchase such a service or device. If a one time charge of $20 were involved, two to four percent of households indicated they would definitely purchase such a blocking service or device. Ameritech states that requiring adult message providers to provide blocking devices to 70 percent of households would be unconstitutionally burdensome.

22. Carriers argue generally that they should not be required to subsidize provision of CPE. Pacific Bell states that if an adequate device existed its cost should be borne by message providers or their customers. Pacific Bell points out that the *Computer II* rules would preclude it from directly or indirectly providing such devices. Ameritech suggests that the Commission should focus on the requirements of Section 223 which concerns what the adult message provider must do in order to avoid the sanctions entailed in the transmission of obscene or indecent materials to minors. There is no possible logical connection, contends Ameritech, between carrier profits earned in supplying transmission services to adult message services and the conclusion that carriers should pay some of the costs of restricting access by minors to such services. The carriers contend that the legislative history to Section 223 makes clear that carriers were not intended to be liable for any costs of implementing Section 223. Bell Atlantic states that the carriers and the ratepayers should not be burdened with financial and administrative responsibility of providing CPE blocking devices.

23. The NYU Media Law Clinic has suggested a plan using CPE which it claims could be used to implement Section 223. Under this plan, the adult message provider in order to obtain the protection from prosecution contemplated under Section 223 would insert at the beginning of the recorded message a specified tone. This tone would be recognizable by a device designed for this purpose at the subscriber's premises which, when it hears the tone, would terminate the call, *i.e.* place the subscriber line in the on-hook state. If placed at the terminal block for the premises only one device would be needed to prevent calling to adult message services from all telephones at that premises. The device could also be installed at individual telephones to

prevent calls from that telephone to adult message services. Unlike blocking devices which would have to be programmed with the numbers calling to which was intended to be prevented, the device described by the Media Law Clinic would prevent calls to all adult message services if the same tone were used by all such message providers. The Media Law Clinic states that the cost to the message provider of inserting the tone would be essentially the cost of a tape cassette containing the tone—approximately $2.00—which would then be recorded onto the beginning of the adult message using the existing recording equipment of the message provider necessary to its normal recording activity. The cost of the customer premises device, according to the Media Law Clinic, would be approximately five to ten dollars. This device could be incorporated into several designs, including security and lock and key arrangements, or incorporated into other CPE. As a separate device, it would be approximately the size of a cube, two inches per side. The Media Law Clinic has included schematic drawings of the electrical design and components and of a suggested tone for its proposed method of implementing Section 223. Southwestern Bell states that the Media Law Clinic proposal is feasible, effective, inexpensive and should be adopted. Bell Atlantic and NYNEX state that the proposal needs further study in that some inadvertent call terminations might occur, it is not clear that the device would meet network technical standards, and that the device could not be powered from the line, but that these concerns do not detract from the overall merit of the proposal.

24. AT&T additionally argues that scrambling should be added as a further means of adult message providers obtaining a defense to prosecution under Section 223(b). Under this approach the message provider would scramble the adult recording it provides to the carrier's public announcement system so that it is unintelligible to the listener unless he has employed a descrambler. AT&T states that existing scrambling equipment costs from $150 to $2,500 for the most sophisticated equipment, and that descrambling equipment could be purchased for approximately $15 by those wishing to hear adult messages. AT&T has submitted a photograph of a portable descrambler about the size of a wristwatch which fits over the earpiece of a standard telephone hand set and which, AT&T claims, provides ex-

cellent quality sound. AT&T argues that there is no legal distinction between requiring the customer to obtain an access code and requiring him to obtain a descrambler. Therefore, a scrambling approach should be adopted, argues AT&T. It also claims that a descrambling approach could be implemented immediately.

25. NYNEX, Southwestern Bell, Bell Atlantic and Ameritech also urge that scrambling be adopted as a permissible method of restricting access by minors to adult message services. They contend that this method would be effective in restricting access at all telephones including pay telephones, would not require modification of any existing carrier public announcement system, and that minors' use of such devices could be easily supervised by adults. NYNEX and Southwestern Bell state that an effective scrambling program would require prohibitions against sale of descrambling equipment to minors. The ACLU states that scrambling is a cost effective means of restricting access by minors without restricting the rights of adults. If AT&T's cost figures are correct, it states, scrambling is significantly less expensive to implement than access codes especially in non-interactive systems. The ACLU points out that record keeping would be unnecessary with scrambling, as long as proof of age was required for purchase of descramblers.

26. Pacific Bell, on the other hand, contends that scrambling would not be acceptable under the constitutional standards set forth in *Carlin I*, *i.e.* it has not been demonstrated that scrambling is well tailored to the ends sought to be achieved or that those ends could not be achieved by less drastic means. Scrambling, Pacific Bell states, would restrict access by all adults, would be ineffective in restricting access by minors in that they would be able to obtain descramblers, that it would not be possible to restrict sales of descramblers to adults, and that scrambling would be burdensome on adult message customers.

27. With respect to warning messages to minors and billing notification and itemization of calls to adult message services. NYNEX states that local calls to public announcement services could not be shown on bills without extensive modification at a cost of approximately $6.7 million taking 18-24 months. It

states that these modifications would be necessary due to insufficient capacity on existing billing equipment. NYNEX further states that in any event this Commission lacks jurisdiction with respect to billing requirements for intrastate calls. NYNEX states that it does not object to a warning message at the beginning of the adult recording, but that callers would still be billed for the call even if they hang up after the warning message. Bell Atlantic states that it already provides some billing notification for calls to its public announcement message providers, but that this should not be considered sufficient by itself to establish a defense to prosecution under Section 223 or effectively restrict access by minors.

28. Apart from the above contentions, the ACLU states that Section 223(b) of the Communications Act is unconstitutional. It is opposed to any governmental control over sexually oriented telephone message services. The burden of protecting minors from such services rests with parents aided by schools and community groups seeking to develop responsible reading, listening and viewing habits of minors. Carlin states that the only permissible regulation would be the warning message and billing notification approach. Other proposals would most likely put it out of business, states Carlin.[12]

29. The URIX Corporation has described a system of equipment and services manufactured by it which it states could be used to restrict access by minors to adult message services. This is essentially central office equipment which would be purchased by carriers and would enable telephone customers to restrict their telephones from receiving certain public announcement services. It would also provide a capability of screening personal identification numbers if Automatic Number Identification (ANI) is not available. Pacific Bell states that this system is infeasible in its system. It would cost $25,000,000, and might not meet Pacific Bell's service standards in that the URIX system might not be able to process the calling volume experienced on its public announcement system and that it might double the completion time for calls beyond Pacific Bell's acceptable standards. Southwestern Bell states that the URIX system is too expensive, could not be used to block interLATA calls to public announcement services, and would overall have severe limitations and be

impractical. Similarly, BellSouth states that it is unclear whether the URIX system could be used to block interLATA calls.

30. In response to the Commission's query on subscribers' right to obtain the identity and address of adult message providers, NYNEX states that effective 1987 it will provide upon request a list of names and addresses of message providers on its public announcement system. Southwestern Bell states that its tariff for public announcement services provides that it may provide to the public the name and address of any message sponsor. For its part, AT&T has recently filed tariff revisions to its Dial-It 900 service providing that upon written request from any interested party, the company will provide a Dial-It 900 service sponsor's identity as indicated on company records. Tariff No. 1, 9th revised page 141, effective December 2, 1986.

31. Phone Programs states that it is a subscriber to carrier public announcement services but that it does not provide adult message services. It claims that message providers such as itself engage in constitutionally protected forms of speech and that any regulation concerning adult message providers which directly or indirectly affected its ability to provide its services would be unconstitutional.

DISCUSSION

32. Section 223 of the Act provides that the regulation adopted by the Commission will establish procedures restricting "access to the prohibited communications to persons eighteen years of age or older." 47 U.S.C. § 233(b)(2). Under the guidelines established by the court, the Commission must additionally select the regulation implementing Section 223 which is the least intrusive upon protected forms of expression: "The government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." 749 F.2d 121. Thus, the Commission's objective is to select the option effectively restricting access to the communications in question to adults which is the least intrusive upon protected forms of expression. We will analyze in turn the various options that have been

suggested for implementing Section 223 to ascertain which best meets this objective for areas served by the New York Telephone Company. As indicated, paragraph 4, *supra*, the access code requirement is currently in effect in all other areas of the country.

33. *CPE Blocking*. Under this proposed method of implementing Section 223, CPE would be employed to block calling to specified numbers of adult message providers. These devices could be programmed to block calling to certain numbers, or to all numbers on a particular exchange, *i.e.*, to all 976 or 900 numbers. In a variation not considered by the court, the device would not have to be programmed but would terminate the call upon recognition of a standardized tone inserted at the beginning of the adult message. As envisioned by the court, all or a portion of the cost of these devices would be borne by the message provider and/or the carrier. It might be possible, for example, to allocate one third of the cost of providing such devices to the purchasing party, one third to carriers (who could recover all or a part from adult message customers), and one third to message providers. As NYNEX has suggested, carriers and message providers might participate in some central organization or clearinghouse which would facilitate provision of these devices to parents.

34. There is not demonstration in the record that such devices could be effective. They are easily disabled by unplugging, or by reprogramming, by the minor. (The Commission's interconnection rules, 47 C.F.R. Part 68, require installation of all CPE by standard plugs and jacks.) Moreover, it would be necessary to place the device either on each telephone in a subscriber's premises or at the network interface (demarcation point) of the premises in order to prevent all calling to adult message services. Since most demarcation points do not have jack/plug access, parents might find it necessary to arrange for installation of a jack through their local telephone company at a cost of, typically, $25 to $65. If the device were placed at a demarcation point located on the outside of the residence or in a less accessible location (such as a utility closet in a multifamily residence), effectiveness would be seriously hampered in that reprogramming by parents in order to block new or changing numbers would

be rendered difficult.[13] The complexity in using any of these devices would hinder their effective use.

35. Moreover, even if CPE blocking devices were effective in the residences in which they were employed, information in the record indicates that most families would not employ them. The survey results obtained by Ameritech reveal that if even nominal costs are involved, only five percent or less of families would seek to use CPE blocking devices. This would leave the great majority of residences and coin telephones with access to prohibited communications not restricted to adults. A CPE blocking plan, therefore, would be ineffective not only because the devices themselves are easily disabled or unplugged but because many residences would not in any event employ them.[14]

36. CPE blocking devices would additionally block calls by adults. While adults might have a comparable or greater ability than children to program or remove these devices, when confronted with such a device, even if placed there by themselves, it constitutes a burden on adults. If placed on premises, such as where a payphone might be located, or at locations where the device is inaccessible, the device would entirely prevent access to the adult message. Therefore, a CPE blocking plan would place burdens on persons who are intended under the statute to have access to adult message services.

37. Significant financial burdens could be imposed on carriers, message providers, and their customers under a CPE plan. 1980 census results reveal that there are approximately 30,000,000 families in the United States with children under eighteen.[15] If the typical total cost per family employing a CPE device were $25.00,[16] and if five percent of families with children under eighteen were to use a CPE device,[17] this would mean that the nationwide cost of implementing this approach would be $37,500,000.[18] One third of this cost would be $12,500,000. The record does not reflect the number of adult message providers who might participate in subsidizing provision of CPE. However, if there are one hundred such providers, under the above figures, the cost per provider would be $125,000. This has not been shown to be the least burdensome method on message sponsors for implementation of Section 223. And five percent penetration would

not effectively restrict access to adult message services to adults. If seventy percent of families used such a device, and the cost per family could be reduced to $5, the nationwide cost would be $150,000,000, or $35,000,000 for all message providers. With one hundred providers, the cost per provider would be $350,000.[19] Therefore, at effective levels of implementation, *i.e.*, a high percentage of households using such CPE, the financial burden would be high even assuming the lowest cost per device submitted in the record—$5. In light of our determination that these devices are not highly effective but can be readily disabled by minors and, further, that CPE blocking could also impose a significant burden on adults,[20] we conclude that the cost associated with CPE blocking is not justified. Accordingly, we conclude that requiring CPE blocking is not an acceptable method of implementing Section 223 in areas served by the New York Telephone Co. or nationwide. *See* note 18, *supra*.[21]

38. *Access Codes.* This approach, already in effect for areas of the country outside the NYNEX system, would restrict access to adult message services to persons who had obtained a prior assigned access code or personal identification number, *i.e.*, adults. While minors could obtain an access code by fraud, theft or by obtaining one from a cooperative adult friend, the rules provide for cancellation of codes where necessary. Thus, this approach would be highly effective in implementing Section 223.

39. Implementation of an access code screening system by message providers requires an interactive communications capability between the caller and the message sponsor so that the caller can transmit the access code to the message sponsor.[22] NYNEX states that its replacement public announcement service will have an interactive capability. It has additionally set forth a "cut-through" method of achieving an interactive capability pending its replacement system with its estimated cost of additional necessary communications service charges.[23] Message providers would additionally need code processing equipment and would incur administrative and other costs in implementing access codes in conjunction with the NYNEX Varick Street public announcement services. Thus, implementation of access codes in conjunction with the NYNEX public

announcement offering is clearly feasible at the present time.[24] Accordingly, we will reestablish access codes as an acceptable defense to prosecution under Section 223 in the areas served by the New York Telephone Company. However, as will appear below, we are establishing an additional defense to prosecution (scrambling), which will afford adult message providers an additional optional method of restricting access by minors to their services and serve to eliminate the concerns of message providers who are customers on present noninteractive public announcement offerings.

40. *Scrambling.* Under this approach, the message provider would scramble the message delivered to the carrier so that it would be unintelligible without the use of a descrambler by the person wishing to hear the message. Because the message itself would be scrambled, this technique would be applicable to virtually all telephones, *i.e.*, there would be no telephones including coin telephones from which a minor could access the adult message service without any restrictions in place.[25] Moreover, minors' access to descramblers could be limited substantially if necessary by requirements imposed by states or this Commission that vendors of such devices assure that they are not sold to minors, and by other safeguards. *See* para. 46, *infra*. Parental supervision would be facilitated under a scrambling technique because descramblers are observable within the household. Accordingly, we believe that scrambling would be an effective alternative method of implementing Section 223.

41. AT&T has stated that the best quality scrambler would cost in the range of $2,500, but that effective scramblers can be obtained for approximately $150. No additional communications services would be required to implement scrambling. While scramblers/descramblers are currently available "off-the-shelf," these are intended for two-way business communications users and are not inexpensive.[26] However, the particular type of frequency inversion acoustic descrambler manufactured in a demonstration unit by AT&T uses existing available technology and components and could be manufactured, according to AT&T, for approximately $15. Availability of descramblers of this type at that price level would be dependent on the existence

of a market for them. Achievement of this market would require message sponsors to promote, explain and advertise their use. Voluntary association among adult message sponsors might be necessary in order to adopt a uniform nationwide "adult message" scrambling technique. Thus, while achievement of the low price that is possible for these devices will entail efforts by adult message sponsors to seek to make scrambling a successful and minimally burdensome method of accessing their services, this should not prevent the Commission from establishing this effective method of implementing Section 223 as a permissible defense to prosecution under Section 223. In any event, the message provider could use sale of descramblers as an additional business opportunity. Thus, it is not clear that such additional administrative costs would actually constitute a burden. While the total cost for all persons purchasing descramblers might be high, we believe that it is likely to be less expensive than CPE blocking plans or similar plans which attempt to block calls by minors since there will be relatively fewer persons purchasing descramblers than there are possible locations from which minors can access unrestricted adult message services. Scrambling would not impose any direct costs on carriers.[27] Accordingly, we believe that scrambling would be effective in preventing access by minors to adult message services and could be implemented at acceptable costs to message sponsors and their customers. We note that a message provider who did not wish to impose the initial cost of purchasing a descrambler to its customers could use an access code system instead.

42. *Billing Notification*. This proposed approach to implementing Section 223 would have two components: (1) a warning message in conjunction with the adult message, and (2) an itemization on telephone bills that a particular call was to an adult message service. While this approach would facilitate parental supervision of minors' telephoning to adult message services, it would not directly prevent minors' access to adult message services. Minors would not actually be prevented from accessing the message by the restrictions themselves, so where minors are unknown to the persons responsible for bills, the aid to supervision contemplated by this approach would be absent. Warning messages would additionally be ineffective for those

public announcement services connecting the caller to a recorded message in progress, rather than to the beginning of the message.[28] Accordingly, billing notification would not by itself be an effective method of implementing Section 223.

43. The burden on message providers to implement a billing notification plan would be small. Similarly, the burden on adult callers in listening to warning messages would be minimal.[29] The burden of implementing a billing notification notification plan would fall primarily on carriers (although some or all of the cost to carriers could be recovered from callers and message sponsors in ratemaking proceedings).[30] In order to implement a notification for the type of interstate transmission of adult message where an interstate call is made to a locally provided service, it would be necessary for each interexchange carrier to be informed of each locally provided adult message service number. It would then be necessary for each interstate call at the time it was placed, or in subsequent billing operations, to ascertain if the terminating number is an adult message service. There is no showing in the present record that this could be accomplished by interstate carriers (including nondominant carriers and resellers) for the enormous volume of interstate calls experienced in this country at reasonable cost or, indeed, at all.

44. AT&T's interstate public announcement service is a different case, however. AT&T itself in normal billing operations will know the identity of the caller (who is sent a bill) and the 900 number message service to which the call was placed. If the adult message provider identifies itself as such to AT&T, AT&T will also know the message sponsors on its public announcement service who are adult message providers. The calling volume to AT&T's Dial-It service is also vastly smaller than the total number of interstate calls, although large in absolute numbers. Thus, although we conclude that billing notification as the sole method of implementing Section 223 would be ineffective and of unknown feasibility and cost with respect to interstate calls placed to local adult message services, we do not see any significant feasibility or cost problems associated with billing notification for AT&T's 900 service. Therefore, we shall require AT&T 900 service providers to request from AT&T that

their services be subject to billing notification in order for them to obtain the defense to prosecution under Section 223. *See* para. 47, *infra*, for discussion of billing notification for AT&T's 900 service as a safeguard to minors obtaining descramblers.

CONCLUSIONS

45. Based on the foregoing analysis, we conclude that neither CPE Blocking nor billing notification would be an acceptable method of implementing Section 223. CPE blocking would be too expensive given its ineffectiveness, while billing notification by itself would be ineffective and, additionally, has not been shown to be feasible at this time for interstate calls to locally provided adult message services. An access code system, on the other hand, is a highly effective method of implementing Section 223. *See* paragraph 38, *supra*: *Second Report and Order*, paragraphs 23-26. Access codes can be implemented in interactive carrier public announcement offerings and in non-interactive carrier offerings by purchase of additional communications services.[31] Thus, an access code requirement appears feasible even in the NYNEX area. Scrambling would also be effective in preventing minors from accessing adult message services in that scrambling would be applicable to all telephones and use of descramblers would be observable to parental authorities. Scrambling would additionally not require code identification and processing equipment and administrative costs of assignment and supervision of personal identification numbers. Thus, implementation of scrambling might in some circumstances be less costly than for an access code system. Scrambling could also be implemented in non-interactive carrier systems including AT&T's Dial-It 900 service without the need for additional communications charges. Therefore, we are establishing scrambling as an alternative acceptable defense to prosecution under Section 223.[32] This will afford message sponsors flexibility in complying with Section 223 and will assure that they are able to select the least burdensome, yet effective method of implementing Section 223. Scrambling will be an available defense in the area addressed by the court in *Carlin II* and in other areas of the country as well.[33] The access code

option will remain in effect and will be available as a defense to prosecution in areas served by the New York Telephone Company.

46. The concern has been expressed by some commenters that scrambling will not achieve the highest effectiveness unless sale of descramblers to minors is prohibited. State and local authorities currently have regulations in place concerning sale of adult products to minors which could be readily amended to include descramblers. We urge states to exercise their authority to prohibit sale of descramblers to minors. Retailers are urged to play a responsible role concerning sale of such devices to minors.[34]

47. Billing notification, while not effective as the sole method of implementing Section 223 in that it would not actually prevent minors' access to adult message services, *see* paragraph 42, *supra*, would facilitate parental supervision where minors are able to obtain access to an adult message service by using a descrambler or access code. While billing notification has not been shown on the present record to be feasible for interstate calls to local numbers, we believe that it can be readily implemented without unreasonable burden to the carrier with respect to AT&T's public announcement service. Therefore, we are requesting AT&T to file within thirty days from the release date of this decision appropriate tariff revisions providing for identification of calls to adult message sponsors on its Dial-It service.[35] Adult message sponsors on AT&T's system will be required to identify themselves as such to AT&T in order to obtain a defense to prosecution under Section 223.[36]

48. The Commission additionally believes that a scrambling plan will be less burdensome on both callers and message providers if a uniform method of scrambling is employed by all adult message providers. The Commission believes the market for descramblers will be uniform and large, thereby promoting the understanding and use of these devices and easing the burden on all parties concerned. In order to facilitate achievement of a uniform method of scrambling/descrambling by those message sponsors using the scrambling option, we are directing AT&T

to submit to the Commission within fifteen days of the release date of this item complete technical specifications for the scrambling product designed by it. This should include detailed technical design descriptions of both the scrambling technique suggested by it and the descrambler. This information will then be placed in a Commission Public Notice to facilitate voluntary use of this standard by all message providers.

49. *Regulatory Flexibility Act Final Analysis.* Pursuant to relevant provisions of the Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.*, we have reviewed this action to determine if there will be a significant impact on a substantial number of small businesses. We believe that our regulation will have some impact on those small business entities contemplated by the Congress when it adopted Section 223 of the Communications Act. We have determined, however, that any impact on these entities is outweighed by the achievement of the statutory mandate of Section 223 to restrict access to adult message services to adults.

50. Accordingly, IT IS ORDERED, That Part 64 of the Commission's rules and regulations IS AMENDED as set forth in the attached Appendix effective June 15, 1987.

51. IT IS FURTHER ORDERED, That the American Telephone and Telegraph Co. SHALL SUBMIT to the Commission within fifteen days from the release date of this item complete technical specifications on the scrambling techniques described and proposed by it in this proceeding.

52. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this decision to be printed in the *Federal Register* and shall send a copy to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a)(1980).

53. Authority for this action is contained in section 8(c) of the Federal Communications Commission Authorization Act of 1983, Pub. Law No. 98-214, December 8, 1983.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 64, Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

1. Section 64.201, is revised in its entirety to read:

64.201 Restrictions on Obscene or Indecent Telephone Message Services

It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b), that the defendant has taken one of the actions set forth in subsections (a), (b), or (c) herein to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with subsection (d), where applicable:

(a) Requires payment by credit card before transmission of the message; or

(b) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(c) Scrambles the message using frequency inversion techniques so that it is unintelligible and incomprehensible to the calling party without use of a descrambler by the calling party; and,

(d) Where the defendant is a message sponsor subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to his message service be subject to billing notification as an adult telephone message service.

FOOTNOTES

[1] The Media Law Clinic and Urix have submitted late filed comments. The Media Law Clinic states that the technical solutions proposed by it were not conceived by it until after the filing deadline. Urix does not provide any justification for the necessity of its late filing. Several parties have submitted comments responsive to the Media Law Clinic and Urix late filings. We find that insufficient showing has been made as to why the matters brought to our attention in the Media Law Clinic and Urix pleadings could not have been submitted in timely fashion. Accordingly, we are not according these pleadings, or the parties with respect to the filing of these pleadings, the same status as would be entailed with timely filed comments. *See e.g.* Section 1.106 of the rules, 47 C.F.R. § 1.106. However, these documents have been associated with the official docket file and have been considered in this decision. Ameritech submitted comments one day late because of a breakdown of word processing equipment. We find this constitutes in this instance sufficient showing for its minimally late filing. Ameritech's comments are accepted.

[2] Section 223(b) provides:

(b)(1) Whoever knowingly –

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

(3) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either —

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(5) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

[3] Carlin Communications, Inc. and Drake Publishers, Inc.

[4] In some carrier public announcement offerings, the carrier uses network switching, bridging and duplication equipment to enable large numbers of callers to hear a recorded message provided by the adult message service. The New York Telephone Company public announcement service, for example, can provide a recording to many thousand callers per hour to a single public announcement number. In other carrier public announcement services, the carrier does not provide the switching, bridging and duplication of messages necessary to provide a message to numerous callers simultaneously. In these cases,

such as in the public announcement services of Bell Atlantic and Pacific Bell, the customer must provide this capability, if desired. This requires, in addition to bridging and other equipment, one line per caller that is desired to be serviced simultaneously. This type of public announcement service provides an interactive capability, *i.e.*, the caller may communicate with the message sponsor. In systems where the carrier produces the mass announcement feature, it is not possible for the caller to communicate to the message sponsor because callers are not connected to the sponsor's premises but to carrier message bridging, switching and duplication equipment.

[5] Section 223 prohibits only the interstate or foreign transmission, or within the District of Columbia, of obscene or indecent messages to minors. *See* note 2, *supra*.

[6] The record does not reflect whether any other interexchange carrier including non-dominant carriers and resellers offer a comparable interstate public announcement service. There are no other mass announcement services tariffed at this agency.

[7] Under the technical configuration of 900 service, because of the location in Missouri of central processing facilities, it might be possible for a 900 service call to be considered intrastate, if the message provider and the caller were both in Missouri. However, while technically possible, the record does not reflect whether this has ever occurred.

[8] The message sponsor may additionally select an option where all or a portion of charges are paid by the message sponsor.

[9] Bell Atlantic also contends that carriers should be permitted to offer an access code verification system if they choose to do so and that in such circumstances the message provider should be required to subscribe to the carrier's access code verification system.

[10] These CPE devices would be located at the customer's premises and could be used to block calling to particular numbers, or to all numbers of a specified exchange, *e.g.*, all 976 or 900 numbers. Also, lock set arrangements are available which prevent those without a key from making calls.

[11] The ACLU has not provided any factual support for this contention.

[12] In Order, Mimeo No. 653, released October 5, 1986, the Common Carrier Bureau denied a request by Carlin Communications for an extension of time in which to file reply comments. In its timely filed reply comments, Carlin stated that it had not been provided sufficient time to prepare adequate reply comments. However, even in its initial comments Carlin failed to provide any cost information specifically requested by the Commission in the *Third Notice*. *See* footnote 23, *infra*. We note that our rules permit, subject to certain restrictions, presentations other than formal comments in informal non-restricted Rule Making proceedings. *See* Section 1.1231(b); *Third Notice*, para. 21.

[13] The beep tone device suggested by the Media Law Clinic and supported by Southwestern Bell would eliminate any problems associated with programming. However, it would not prevent minors from hearing portions of the adult message in announcement systems such as AT&T's 900 service where the caller is connected to a repetitive recording in progress, not the beginning of the message. Nor, as with other types of CPE blocking devices, has it been shown that this beep tone device would be employed in a significant percentage of households. Accordingly, this device would not be effective in achieving the purposes of Section 223. *See* footnote 14, *infra*. In addition, the beep tone device has not actually been manufactured, even in prototype, and some carriers have raised question concerning its technical feasibility. Comments, Bell Atlantic, p. 5. Therefore, substantial limitations exist with establishment of this device as a regulatory requirement at this time. *Electronics Industries Association Consumer Electronics Group v. FCC*, 636 F.2d 689 (1980).

[14] As indicated, Section 223 provides that the regulation adopted by the Commission will restrict access to adult message services *to adults*. 47 U.S.C. § 223(b). As we interpret this statue, a high degree of effectiveness is contemplated so that if access is restricted to adults, as stated by the statue, minors will have

virtually no access to adult message services. While absolute impossibility of access to such services by minors is not feasible, we do not believe that a CPE plan, or any other plan, leaving a majority of households and telephones with unrestricted access to adult message services will meet the high standard of effectiveness set forth in Section 223.

[15] 1980 Census, United States Department of Commerce, Bureau of the Census. A family is defined as two or more persons residing together related by birth, marriage or adoption. Presumably, there is a greater number of total households including families with children under eighteen.

[16] The present round of comments in this proceeding indicate that the cost of a device which could block outgoing calls or otherwise terminate a call to adult message providers ranges in price from $5 to $89. The device, to be effective, would be installed at the demarcation point, or at all telephone jacks. *See* para. 34, *supra*. (Additional carrier installation charges of $25 to $65 or more may be involved if the customer does not already have a telephone jack/plug arrangement at the demarcation point.) It is difficult to determine accurately what the average cost per household using such a device would be, but a nominal figure of $25 would, for our analysis here, seem reasonable.

[17] The survey results obtained by Ameritech, *see* para. 21, *supra*, indicate approximately this many households with children might wish to employ a CPE device.

[18] It would not be possible to use CPE as a method of implementing Section 223 only in areas served by the New York Telephone Company. Section 223 envisions procedures that will restrict *interstate* access to adult messages: in order to prevent interstate access to their adult message services, message sponsors in New York would potentially be required to participate in provision of CPE to any person anywhere in the country (except New York). Individual message providers, however, will not be able to undertake to supply CPE to the entire country. Therefore, CPE can only be considered for implementation on a nationwide basis.

[19] Based on the Ameritech survey, however, this level of implementation would be achieved only if no costs were borne by families, *i.e.*, if message providers, carriers and their customers carried a greater proportion of the costs.

[20] In our view, a basic flaw of the CPE plan is that in general any plan seeking to implement Section 223 by placing restrictions at possible telephones from which a minor could call is not likely to be of acceptable cost because there are so many of them, even if the cost per telephone is small. In contrast, restrictions at the source of the message or on the adult message customer will probably be of lesser overall cost because there are relatively fewer of them.

[21] URIX has described central office equipment which could be used by carriers to offer subscribers the ability to selectively block calls to certain numbers (network blocking). The record does not clearly demonstrate that this equipment could be technically or economically implemented as a means for carriers to block interstate calls to adult message numbers. The Commission is aware of passage of AB 2550 (Ch. 1561. Stats. 1985) by the California legislature directing the California Public Utilities Commission (CPUC) to require carriers to offer residential subscribers the option of blocking access to 976 service, taking into account the operational requirements of the various types of telephone equipment used by carriers. However, the CPUC has recently delayed implementation of this requirement until January 1, 1988, in part because the legislature is expected to reexamine the network blocking issue, according to the CPUC. *Interim Decision*, Decision 87-01-042, January 14, 1987, p. 17. Because state ordered network blocking, if it entailed the ability to block interstate calls to adult message numbers, could affect the necessity for other methods of implementing Section 223, the Commission will carefully monitor state actions in this regard. For the present, we reiterate our finding that there is no basis for this Commission to find that network blocking is an acceptable method of implementing Section 223. *See Second Report and Order*, para. 15.

[22] Essentially, one line would be required for each access code that would be transmitted at one time. Thus, the message provider would need ten lines to process ten access codes simultaneously.

[23] Under the so-called cut-through approach, estimated additional one-time communications charges up to $73,000 and monthly recurring charges up to $12,000 would be incurred. The message provider would also have to provide announcement equipment sufficient to handle anticipated calling volumes, under the cut-through approach. Adult message sponsors have failed to provide any cost data suggesting that these costs are unreasonable in relation to the revenues obtained from adult message services provided over carrier public announcement offerings. Thus, message sponsors have failed to meet their burden of demonstrating that access codes would be prohibitively expensive to implement. *See Third Notice*, paragraphs 16 and 19, specifically requesting such cost information. In addition, the "cut-through" approach suggested by NYNEX is not greatly different than the interactive public announcement offerings of other carriers where the customer, not the carrier, provides the capability to process multiple simultaneous calls. *See* footnote 4, *supra*. Thus, in the Pacific Bell offering the message sponsor will obtain sufficient communications lines to handle the anticipated volume of calls and must itself provide the bridging and duplication capability necessary to handle simultaneous callers. Under both the NYNEX "cut-through" and existing interactive offerings of Pacific Bell, Bell Atlantic and other carriers, the carrier provides a two-way line between the message sponsor and the caller (at the message sponsor's expense) and the billing collection or promotional compensation feature. Under the NYNEX proposal, however, the message sponsor would obtain private lines between the Varick switch and the message sponsor's premises, whereas in other carrier offerings the message sponsor will pay the less expensive business line rate. While NYNEX has proposed private lines, it might be possible to achieve an interactive capability using the business line rate. AT&T has submitted costs of hardware necessary to implement an automated access code system. *See* AT&T letter to William J. Tricarico dated November 10, 1986. The total costs cited by

AT&T are those that would be entailed where it is necessary to have multiple locations, or nodes, for distribution of messages. In the case where calls are received by the message provider at one location, only the costs for one central control station ($4,005) and for as few as one remote node ($8,060) would be entailed in obtaining necessary equipment, based on AT&T's design.

[24] We are unpersuaded that other significant burdens would be entailed in an access code approach. The burden of filling out an application form to obtain an access code is minimal. Nor are we persuaded that the alleged reluctance of adults to disclose their identity to the adult message provider makes the access code plan intrusive. Such disclosure is already undertaken when persons call live adult services and pay by credit card. We have not been informed that this method of payment has had any stifling effect on adult message services. Disclosure of identity is also already entailed in normal billing operations by carriers for calls to public announcement service numbers. We additionally note that any disclosure encompassed in an access code system is not required to the government but to private interests who have invited callers to enter into a voluntary commercial transaction. Thus, the alleged reluctance of adults to disclose their identity arises from concerns relating to the commercial interests to whom the disclosure is made. In any event, we believe that these concerns are within the ability of the message provider to control or ameliorate by assurances of, and actual responsible use of, information obtained from callers.

[25] The demonstration unit manufactured by AT&T is a portable, battery powered device which fits over the earpiece of the telephone handset. Thus, while scrambling would be effective at all locations, use of an inexpensive portable device would permit access by adults from virtually any telephone including pay telephones. Of course, descramblers would not be required to be of the portable type. Non-portable devices could be used in the home if desired.

[26] Voice privacy scramblers and descramblers which are directly electrically connected to the telephone network require

registration under Part 68 of the Commission's rules, 47 C.F.R. Part 68. *See e.g.*, Unex/Controlonics Corp., Voice Scrambler Unit, FCC No. BS88XV-11947-KX-N. Acoustic descramblers, because they are not directly electrically connected to the telephone network, would not require registration under Part 68.

[27] Pacific Bell has alleged that scrambling would be unconstitutional. However, it has failed to explain in what regard it believes scrambling would be unconstitutional.

[28] AT&T's 900 Service connects a caller to a recording in progress where a repeated recorded message is employed.

[29] It is possible that some adults might find the billing notification inhibiting or burdensome in some circumstances, *e.g.*, calling to adult message services at work situations would be revealed to employers, or to spouses and other adult persons who might be reviewing the telephone bill for the location from which the call was made.

[30] Adult message providers using public announcement services do not perform any billing for the message. Billing and collection from the caller, is performed entirely by the carrier. Therefore, only carriers are able to implement itemization on telephone bills of adult message calls.

[31] AT&T has estimated the costs of achieving an interactive capability on its Dial-It 900 service. *See* paragraph 13, *supra*. No showing has been made that these costs are unreasonable in relation to the revenues achieved by adult message providers on Dial-It 900 service.

[32] NYNEX has argued that the rule adopted by the Commission should provide for submission by message providers of individual plans for implementing Section 223. However, we believe that a uniform nationwide rule would be preferable in that individual plans would delay implementation of restrictions by minors to adult message services for the providers in question especially if providers chose to appeal adverse decisions by the Commission. Accordingly, we reject NYNEX's argument on this point.

[33] The Commission is unpersuaded by the claim made by Carlin that any requirement other than a warning message at the beginning of the announcement would be impermissibly burdensome in that such requirements such as scrambling or access codes would simply put it out of business. This claim is completely unsupported. Moreover, we believe that full implementation of either access codes or scrambling would merely result in a market segmentation of adult message services. Those messages that are obscene or indecent and for which the message provider seeks to obtain the protection of Section 223(b) will be provided subject to access codes or scrambling. Less offensive messages not falling under the proscription of Section 223 and which are not in any event prosecutable will continue to be provided without scrambling or access codes. Carlin has failed to present any evidence whatsoever that this market segmentation would result in any financial detriment to adult message providers.

[34] If necessary, the Commission will consider exercising its authority contained in Sections 4(i) and 223 of the Communications Act, 47 U.S.C. §§ 154(i) and 223, to prohibit the sale of descramblers to minors.

[35] In the Third Notice the Commission stated that "telephone companies are on notice that they may be called upon to implement services compatible with our regulation or face the possibility of terminating their Dial-It offerings entirely." *Third Notice*, para. 12.

[36] However, we will not require a warning message to be provided by adult message sponsors on AT&T's 900 service because warning messages are not effective for connections to repetitive recorded messages in progress such as are employed on the AT&T system. In other words, the warning message would not be heard by the caller until transmission of all or a portion of the adult message.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

(Gen. Docket No. 83-809; FCC 87-143)

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials

AGENCY: Federal Communications Commission.

ACTION: Third Report and Order.

SUMMARY: The Commission has amended § 64.201 of the Commission's rules, 47 CFR 64.201, to provide that as an alternative to requiring prepayment by credit card, or, establishing an access code system, persons may restrict access by minors to adult message services provided by telephone by scrambling the message. Use of one of these methods to restrict access by minors to adult message services will establish the defense to prosecution created under section 223(b), 47 U.S.C. 223(b), which makes it unlawful to transmit to minors by telephone obscene or indecent communications. The Commission additionally required that in order to obtain the defense to prosecution of section 223(b) adult message providers on public announcement services tariffed at the Commission must request from the carrier offering the service that calls to their service be subject to billing notification as an adult message service.

EFFECTIVE DATE: June 15, 1987.

FOR FURTHER INFORMATION CONTACT:
Patrick Donovan, Domestic Facilities Division, Common Carrier Bureau, (202) 634-1832.

SUPPLEMENTARY INFORMATION:

This is a summary of the Commission's Third Report and Order adopted April 16, 1987, and released May 4, 1987, Gen Docket 83-969 amending § 64.201 of the Commission's rules.

The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Commission Decision

In *Carlin Communications v. FCC*, 787 F.2d 846 (2d Cir. 1986) the court invalidated § 64.201 of the Commission's rules, 47 CFR 64.201, insofar as it applied to areas served by the New York Telephone Company. Section 64.201 provided that requiring prepayment by credit card or use of an access code system were acceptable methods by which telephone adult message services may restrict access by minors. Compliance with § 64.201 by adult message providers establishes a defense to prosecution under section 223(b) of the Communications Act, 47 U.S.C. 223(b), regarding transmission of obscene or indecent materials to minors. The court found that the public announcement service offered by the New York Telephone Company was non-interactive in that it was not possible for message providers to transmit access codes to the message provider. The court additionally found that the Commission had not adequately explored whether use of customer premises equipment by parents might not be a less burdensome method for adult message sponsors to restrict access by minors.

In its *Third Report and Order*, summarized here, the Commission reestablished access codes as an acceptable method to restrict access by minors to adult message services in areas served by the New York Telephone Company. The Commission clarified that with purchase of additional communications services from the telephone company the message provider could obtain an interactive capability enabling it to implement an access code system. The commission additionally identified scrambling as an acceptable method to restrict access by minors to adult mesasge services. Under this approach the message would be scrambled so that it would be unintelligible without use of a

descrambler by adult callers. The Commission stated that it would consider exercising its auth rity if necessary to prohibit sale of descramblers to minors. As a result of the Commission's decision in the *Third Report and Order* adult message providers, in areas served by the New York Telephone Company as well as all other parts of the country, may comply with § 64.201 by either requiring prepayment by credit card, establishing an access code system, or scrambling the message.

The Commission further found that billing notification would be a significant enhancement to the effectiveness of access codes or scrambling where a minor is able to obtain an access code or a descrambler. Under billing notification, calls to adult message numbers would be labeled as such on telephone bills. The Commission requested that AT&T amend its tariff within 30 days to provide such notification for calls to adult message services on its Dial-It 900 service. In order to comply with § 64.201 adult message providers on public announcement services tariffed at the Commission, such as AT&T's Dial-It 900 service, are required to request from the carrier that calls to their services be subject to billing notification. This latter requirement, applicable only to message sponsors on public announcement services tariffed at the Commission, applies in addition to the requirement that such message sponsors use either prepayment by credit card, access codes or scrambling in order to restrict access by minors. However, the Commission declined to order billing notification for interstate calls to locally tariffed adult message services, because it was not clear on the present record this would be economically feasible. With respect to the issue of using customer premises equipment as a method of restricting access by minors to adult message services, the Commission found that use of such devices would be ineffective in that they can be easily disabled by minors, and could be prohibitively expensive if message providers were required to pay for some of the cost of providing such equipment to parents.

Ordering clauses

50. Accordingly, it is ordered, that Part 64 of the Commission's rules and regulations is amended as set forth in the attached Appendix effective June 15, 1987.

51. It is further ordered, that the American Telephone and Telegraph Co. shall submit to the Commission within fifteen days from the release date of this item complete technical specifications on the scrambling techniques described by it in this proceedings.

52. It is further ordered, that the Secretary shall cause a summary of this decision to be printed in the **Federal Register** and shall send a copy to the Chief Counsel for the Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a)(1960).

53. Authority for this action is contained in section 8(c) of the Federal Communications Authorization Act of 1983, Pub. L. No. 98-214, December 8, 1983.

List of Subjects in 47 CFR Part 64

Communications common carriers, Communications equipment, Telephone, Obscene or indecent communications.

Federal Communications Commission.

William J. Tricarico,

Secretary.

PART 64—[AMENDED]

Part 64, Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation from Part 64 continues to read:

Authority Section 4: 45 Stat. 1688, as amended; 47 U.S.C. 154, unless otherwise noted.

2. Section 64.201 is revised in its entirety as follows:

§ 64.201 Restrictions on obscene or indecent telephone message services.

It is a defense to prosecution under section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. 223(b), that the defendant has taken one of the actions set forth in paragraph (a), (b), or (c) of this section to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with paragraph (d) of this section, where applicable:

(a) Requires payment by credit card before transmission of the message; or

(b) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) Issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) Established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(c) Scrambles the message using frequency inversion techniques so that it is unintelligible and incomprehensible to the calling party without use of a descrambler by the calling party; and

(d) Where the defendant is a message sponsor or subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to his message service be subject to billing notification as an adult telephone message service. (FR Doc. 87-10739 Filed 5-11-87; 8:45 am)

BILLING CODE 6712-01-86

CARLIN COMMUNICATIONS, INC. AND
Drake Publishers, Inc., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
United States of America, Respondents.

No. 638, Docket 85—4158.

United States Court of Appeals,
Second Circuit.

Argued Dec. 19, 1985.

Decided April 11, 1986.

Petition was brought challenging Federal Communications Commission regulation requiring providers of "dial-a-porn" services to provide services only to callers with access codes. The Court of Appeals, Oakes, Circuit Judge, held that with respect to services operating under mass announcement system of New York carrier, there was no evidence that access codes were technically feasible and decision contained insufficient evidence that codes were the least restrictive means of limiting minors' access to such services.

Petition granted; regulation set aside.

Lawrence E. Abelman, Abelman Frayne Rezac & Schwab, New York City (Marianne F. Murray, of counsel), for petitioners.

Sue Ann Preskill, Washington, D.C. (Richard K. Willard, Hermes Fernandez, Jack D. Smith, Daniel Armstrong, of counsel), for respondents.

Before: OAKES, KEARSE, and PIERCE, Circuit Judges.

OAKES, Circuit Judge:

We are not without empathy towards a federal agency torn between a congressional directive on the one hand and a court-imposed constitutional limitation on the other hand. Congress has directed the Federal Communications Commission ("Commission" or "FCC") to make regulations restricting access by minors to "dial-a-porn," the shorthand nomenclature of a telephone service that provides a caller with sexually explicit messages. 47 U.S.C. § 223(b)(2) (Supp. I 1983).

Under section 223(b)(2), compliance with these regulations establishes a defense to criminal prosecution for violating section 223(b)(1): making "any obscene or indecent communication for commercial purposes to any person under eighteen years of age . . . ." This prohibition was enacted by a Congress well aware that not only were "very complex issues" relating to "technical feasibility" involved, 105 Cong.Rec. E5966-67 (daily ed. Dec. 14, 1983)(remarks of Rep. Kastenmeier), but that under the Constitution the adult population may not be reduced to "hearing only what is fit for a child." *Id.* at E5966 (citing *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)). The regulations are to "permit adult access while limiting children's access," having in mind that "[i]f . . . no such regulations are feasible, then less restrictive measures rather than broader restrictions will have to suffice to avoid any constitutional infirmity." 105 Cong. Rec. at E5966.

When the FCC's dial-a-porn regulations first came before us, we held that they were both overinclusive and underinclusive, *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984)(*"Carlin I"*). The Commission had sought to restrict the dial-a-porn operation of petitioner Carlin Communications, Inc. ("Carlin"), and its related corporations to the hours beteween 9 p.m. and 8 a.m. Eastern Time. 47 C.F.R. § 64.201 (1985). Without declaring that regulation impermissible, we held that the record was insufficiently developed to uphold it. Specifically, while holding that "[t]he interest in protecting minors from salacious matter is no doubt quite compelling," 749 F.2d at 121 (citing *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)), we nevertheless found that the Commission

had "failed adequately to demonstrate that the regulatory scheme is well tailored to its ends or that those ends could not be met by less drastic means." 749 F.2d at 121. In fact, the time-channeling regulation denied adults access to dial-a-porn messages during daytime hours but did not prevent minors from calling the service during nighttime hours. Moreover, we expressed concern that the Commission had not adequately examined other alternatives that might better serve the competing interests at stake. We noted, for example, that it might be possible to "giv[e] subscribers the option of blocking access to certain telephone numbers from their premises," *id.* at 122 (footnote omitted), or to "requir[e] each caller to provide an access number for identification to an operator or computer before receiving the message." *Id.* After further development of the record, the Commission has approved a regulation that adopts this second suggestion. We are, however, on the record as developed before the Commission, not yet convinced that the regulation was chosen with the appropriate constitutional strictures in mind even though more "comprehensive investigation and analysis," *id.* at 123, was given on this trip around.

We therefore grant the petition to review, continue the stay of the FCC order, which we granted pending appeal, and remand to the commission. The stay, however, is granted only at the behest of the petitioners here, Carlin and Drake Publishers, Inc., and not on behalf of any of their affiliates or any other corporations located anywhere else in the United States and applies only to dial-a-porn service providers on the New York Telephone Company ("NYT") system. We are cognizant of the representation of petitioners' counsel at oral argument and otherwise that the petitioners do business only in the State of New York (even though long distance telephones may access their services). We also are aware of the very thorough and persuasive presentation before the Commission by the NYNEX telephone companies (NYT and New England Telephone and Telegraph Company) dated May 14, 1985, and incorporated in the record before us. Irrespective of whether the regulation may conceivably be valid as applied to the rest of the country, it is clearly arbitrary and capricious as to dial-a-porn providers on the NYT system.

The NYT Mass Announcement Service ("MAS") is a one-way distribution system in which it is technically infeasible to provide the two-way access (which apparently is available in most other parts of the country) between the caller and the information provider on which the so-called "access code" regulation now espoused by the Commission is based. In short, the FCC regulations would put Carlin out of business in New York. While this might be a consummation devoutly to be wished by some, it comports neither with this court's prior ruling, nor with overall constitutional or statutory considerations. So stating, we do not decide the constitutionality or feasibility of the Commission's access code regulation insofar as it applies to dial-a-porn providers outside the NYT system. Nor do we express any opinion on the advisability or propriety of the Commission's imposing different requirements depending upon the telephone system involved.

FACTUAL BACKGROUND

We will assume a familiarity with our prior decision in *Carlin I*. To the extent necessry we will update the facts from the record before the Commission and this court.

We note that for the six months ending April, 1985, dial-a-porn calls appear to have leveled off at 6 to 7 million per month, approximating 15 to 18% of the total NYT MAS network calling volumes. Based on the NYT's MAS tariffs as of May 1985, which yield 2.0¢ per call to the "provider" of services, it is evident that the gross revenue of the dial-a-porn service providers[1] is in the vicinity of $130,000 per month. NYT receives 9.4¢ per call (the average revenue per message of 11.4¢ less 2.0¢) to compensate it for the services it renders to the information providers, including collecting revenues from customers. Thus, telephone company gross revenues from dial-a-porn exceed a half million dollars a month.

---

[1] Although the record indicates that there are eight dial-a-porn channels on NYT's MAS network, it does not indicate the identities of the service providers. Carlin was the only subscriber to submit comments to the FCC or to petition this court, and nothing in the record indicates that Carlin could not control several channels.

NYNEX normally does not keep data on usage of pay telephones by MAS callers in general or by dial-a-porn callers in particular. However, NYT did perform a study which found that out of 8,358 calls placed to the eight "adult entertainment" channels in the MAS network during the study period, only 144 or 1.72% were placed from coin lines. There was no indication what, if any, proportion of these 144 callers were minors. Telephone company data also point out that the incidence of interstate coin calling by minors to dial-a-porn is likely to be even less given the relatively high price – $2 or more – for the 57-second phone message, and the fact that any non-paid use of a pay phone, presumably charging the call to a home or credit card number, to call dial-a-porn interstate would show up on a bill. Thus, it is apparent that any solution to the dial-a-porn problem would not necessarily be rendered unacceptable merely because it did not cover coin calling.

The Second Notice of Proposed Rulemaking

Following our decision of November 2, 1984, setting aside the time-channeling regulations, the FCC, in 50 Fed.Reg. 10510 (1985), issued a Second Notice of Proposed Rulemaking ("Second Notice") proposing "to amend its rules to provide a defense to enforcement of prohibitions against dial-a-porn services," *id.*, and soliciting additional comments on its regulations. The Second Notice invited comment on a new approach that "responds directly to the need of parents to police the use of their telephones." *Id.* at 10512. Under this approach telephone companies would be required to report on monthly bills to their customers any local or long distance calls made to 976-type numbers[2] and the dial-a-porn service providers would be required to reimburse the telephone companies for their administrative costs.

The Commission also called for comments on screening and blocking devices and services, *i.e.*, blocking access to one or more

[2] "976" is the exchange used by NYT's MAS system, as well as other telephone companies' MAS systems, but there is no technical requirement that MAS channels be limited to the 976 exchange.

pre-selected telephone numbers either by installation of specialized equipment at the local telepone company's central office or by the use of call-blocking technology in the telephone customer's own terminal equipment. Previously the FCC had concluded that blocking or screening would require time to develop and could entail costs that would outweight the benefits to be obtained. In the Second Notice, the Commission noted that since its original hearings, "there have been significant changes in the telephone industry," *id.*, and thus "[i]t is possible . . . that screening at the originating central office is tenable." *Id.* With reference to a blocking device installed at the calling customer's premises, the Commission had originally concluded that " 'no existing commercial device has a screening capability that could be deployed within the subscriber's terminal equipment.' " *Id.* at 10513 (quoting 49 Fed.Reg. 24996, 24999 (1984)). This court had noted, however, that certain federal buildings have installed equipment that blocks all outgoing 976 calls. *Carlin I*, 749 F.2d at 122 & n. 15. We also suggested that a regulation could be promulgated to provide the section 223(b) defense to a message provider who makes a blocking device available to telephone customers who request it. *Id.* at n. 16. The Second Notice stated that "there is considerable competition among terminal equipment suppliers, and it follows that there is an incentive among manufacturers, presumably eager for new opportunities, to develop a device that blocks outgoing calls from a subscriber's premises. We believe, therefore, that there exists a ready means of supplying such a device." 50 Red.Reg. at 10513. The Commission added that

> there would appear to be no patently insurmountable obstacle to development of, for example, a simple electronic device with a locking cover that would allow a subscriber to block one of a series of telephone numbers—even an entire exchange—from being dialed from his or her premises. . . . Such a device would obviate the need for replacing or modifying any telephone within a home or office to prevent minors from dialing dial-a-porn numbers; and the "lock" would serve as a practical means of discouraging children from tampering with the programming.

Id. (footnote omitted). The FCC concluded that "the option of relying upon a blocking device at the subscriber's premises . . . remains a practical option by wh[i]ch we may accomplish the mandate of Congress." *Id.*

It also asked for comments upon access and identification codes, and suggested that an automatic coding scheme known as "scrambling," *i.e.*, mixing the content of a signal before transmission and reconstituting it on receipt, which the FCC had not previously considered, might be feasible and warranted public comment. Finally, since this court did not rule out the limitation of operational hours when carefully evaluated against all reasonable alternatives, *see* 749 F.2d at 123, the Commission invited comment on other time-channel approaches.

Comments in Response to the Second Notice

In response to the Second Notice, the Commission received numerous comments, of which the following are included in our record: Carlin; NYNEX; the American Civil Liberties Union (ACLU); Ameritech Operating Companies; Telecommunications Technology Corp. (TTC); Cincinnati Bell Telephone Co.; Home Box Office and American Television & Communications Corp.; Pacific Bell and Nevada Bell; Pennsylvania Public Utilities Commission; American Telephone and Telegraph Co.; BellSouth Companies; Bell Atlantic Telephone Companies; and Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. Reply comments followed from Carlin, NYNEX, the ACLU, and Carlin's counsel.[3]

---

[3] Other parties submitting comments or replies in response to the Second Notice were Congressman Thomas Bliley; Continental Telecom, Inc.; Dial Info, Inc.; District of Columbia Public Service Commission; Minnesota Attorney General; Morality in Media; New York Department of Public Service; Phone Programs and Info Line, Inc. (joint comments); Productions-by-Phone; Southwestern Bell; Tel Control; United States Catholic Conference; and United States Telephone Association (USTA). Late-filed reply comments submitted by Telecommunications Research and Action Center were accepted for filing as informal comments. 50 Fed.Reg. 42699, 42700 n. 3 (1985).

NYNEX's May 14, 1985, comments to the Commission described its mass announcement service, which is offered to the public pursuant to state tariff. The provider makes recorded announcements available to large numbers of callers simultaneously without adversely affecting telephone service to others on the public switched network. There are 44 channels on NYT's MAS network. Separate channels provide time and weather information, stock market reports, state lottery results, off-track betting information, and sexually explicit messages. According to NYNEX, the Bell operating companies, including NYNEX, may not provide recorded message services except for time and weather information, partly as an outgrowth of *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). As a result, NYNEX awarded the use of MAS channels to information providers through a random drawing procedure. Those awarded a channel provide the messages and, under the state tariff, are solely responsible for the contents of the recorded message. The 44-channel system handled over 470 million calls during 1984. Although the aggregate calling volume to the adult entertainment channels has diminished both in absolute numbers and as a proportion of all MAS calling, dial-a-porn remains one of the most popular programs.

NYT's MAS system is a one-way dedicated network. A subscriber calling a MAS number is not connected to the information provider or even to the master center, where the recorded messages are piped from the provider's premises. Rather, the call is connected to one of fifteen subcenters, where the caller is bridged onto the recording on a receive only basis. Theoretically, over 7,900 callers can be connected simultaneously to the same recorded message and the system as a whole can handle over 400,000 calls per hour.

The NYT MAS system features synchronous entry and automatic cut-off so that a caller is cut in at the beginning of a desired message and is disconnected after hearing the message once. The three phases operate so that no caller has to wait more than twenty seconds for the message to begin. While he is

waiting a ring is heard, which presumably represents the connection through the public switched network to the designated subcenter. NYNEX carefully pointed out that "[m]ass announcement equipment used by other telephone companies around the country may include features (such as two-way communication between caller and information provider, or variable pricing arrangements) which the New York system, given its particular technology and call volume requirements, cannot provide." NYNEX comments took the position that an access code approach is not technically feasible in New York because the access code requires a two-way system and NYT's network is only one-way.

NYNEX also commented on its billing procedures, pointing out that it does not report local calls to its 976 numbers or for that matter to any other local numbers on customers' monthly bills. Indeed, to report the 976 local calls would cost almost $48 million per year plus a start-up cost of almost $7 million. On the other hand, interstate calls are reported separately on monthly bills by interexchange carriers. NYNEX's comments quoted Representative Kastenmeier to the effect that "parental responsibility must play a role here. If a family's telephone bill shows long distance calls – including any to a dial-a-porn number – it should be up to the parents, not the Congress or the FCC, to set rules which limit access by children to these messages." 105 Cong.Rec. at E5967.

Although NYNEX took the approach that blocking at the local telephone company offices is infeasible, it asserted that blocking at the caller's premises is an "[a]ttractive [o]ption," and is both "technically and economically feasible." NYT said it was currently developing a working model of a blocking circuit. Upon its installation where the access line enters the caller's premises (or on a single extension phone if the customer wishes), the circuit may be programmed to recognize up to 128 combinations of dialed digits and, upon such recognition, the circuit drops the connection to the central office. Consequently, the call is never connected through the switch and therefore is not billed. NYNEX "anticipated that the final design of the

circuit will permit the individual subscriber to select the numbers to be blocked, and to modify the selection subsequently. . . . [T]he programmable blocking circuit will sell for less than $50 per circuit." The comments went on to say that such a blocking circuit "would be more effective at its intended purpose – restricting minors' access to dial-a-porn – than screening and blocking in the central office." It would work equally well regardless of the type of central office and would not depend upon the availability of code controls. It also would not be restrictive of the ability of adults and minors to make permissible calls because it can be programmed to block dial-a-porn numbers while permitting access to other MAS numbers. Moreover, it is not limited to blocking numbers on the 976 exchange. It would also save the telephone company administrative and installation costs as compared to central office blocking. As previously indicated, the telephone company also considered that dial-a-porn calling from pay telephones is minimal.

NYNEX then addressed the critical question who should bear the costs of blocking devices and whether telephone companies should be required to notify subscribers that blocking devices are available. NYNEX supported the Commission's suggestion in the Second Notice that the cost of obtaining and installing a blocking device be borne by the dial-a-porn operators. It did warn that implementaiton of such a cost-shifting measure raises three questions: (1) who decides who the dial-a-porn operators are; (2) how should costs be allocated among them; (3) what mechanism should be used for collection? NYNEX suggested that one solution would require all persons wishing to avail themselves of the section 223(b) defense to prosecution to identify themselves to some central authority, either the Commissioner or an independent association. This authority would serve as a clearinghouse, maintaining an up-to-date list of participants with appropriate identifying information, and administering a funding and allocation scheme, perhaps based on calling volumes or revenues. Parents or telephone companies desiring to be reimbursed for blocking devices would present their claims to the central authority for payment.

NYNEX, in its reply comments as of June 11, 1985, noted that one equipment vendor, TTC, is already marketing customer

premises blocking equipment, but that by virtue of the divestiture decree NYNEX would not be able to market its own device. It suggested that the Commission may be able to fulfill its congressional mandate simply by finding that an appropriate blocking device is feasible and available in the marketplace and capable of assisting concerned parents. It agreed with several other telephone companies and the U.S. Telephone Association that "such a market-based approach – under which those customers desiring to block calls from their premises would obtain blocking devices in the competitive marketplace, at their own expense – may be the best solution." But NYNEX stated that if the cost of such a device is too great to be borne by concerned parents the Commission should not impose that burden on telephone common carriers or their ratepayers. Noting that cost-shifting presents special problems, the NYNEX reply comments indicate that the Commission may prefer to go instead to a scrambling, access code, or time-channeling approach, the cost of which would fall on the dial-a-porn operators and their patrons. The reply comments do not address themselves to the infeasibility of the access code approach.

By letter of counsel dated July 29, 1985, Carlin also maintained that "the only technical solution that is both feasible and likely to pass constitutional muster is the utilization of currently available customer premises equipment which allows [*sic*] telephone subscribers to block or limit outgoing calls," and that "[s]uch devices have been endorsed by various telephone operating companies." Carlin noted Pacific Bell's announcement on NBC's "Today Show" on July 2, 1985, that it will offer customer premises call control devices to all subscribers for a nominal one-time charge of no more than $5. Carlin's May 13, 1985, comments also stated that "[a]ny access and identification code procedure would be economically and adminstratively impracticable where the viability of the system relies on the ability to simultaneously service multiple callers."

The Commission's Second Report

The Commission's Second Report and Order was adopted October 10, 1985, and published October 22, 1985, 50 Fed.Reg.

42699. The Commission rejected all network (exchange, line number, and equal access number forwarding) blocking, by which outgoing calls are impeded at telephone company central offices, because of economic and technical infeasibility. The Commission also found exchange (three- or four-digit) blocking constitutionally flawed because it would block all "dial-it" messages, *see* 749 F.2d at 122 n. 14; moreover, it would be ineffective since MAS numbers are not legally or technically required to be assigned to 976 exchanges.

The Commission rejected line number (seven-digit) blocking, even though there is "a recently innovated service commonly referred to as Customer Local Area Signalling Service (CLASS)," *id.* at 42703, which would permit such blocking from central offices. Telephone company comments indicated that although feasible, CLASS is currently experimental in nature and implementation of it entails an expensive process not expected to be generally available prior to 1987. Moreover, the CLASS blocking feature is not adequate to handle the large number of dial-a-porn systems currently in operation.

The Commission also rejected another blocking scheme, "equal access (ten digit) number forwarding," finding that number forwarding is not expected to become available on a nationwide basis for some fifteen years and even then would be of only limited use. The Commission indicated that it would continue to monitor the development of these blocking schemes and would be prepared to consider them as regulatory alternatives in the future. We commend the Commission for its careful consideration of these schemes and for its openminded flexibility toward dealing with them in the future. These findings relative to network blocking are fully supported by the evidence, are clearly not arbitrary and capricious, and do not merit further consideration in this opinion.

The Commission also considered the methods by which blocking may be implemented at the premises of dial-a-porn service providers, including time-channeling, message scrambling, and access and identification codes. Time-channeling was rejected along the lines of our previous opinion, on the basis that

"it prevents adults from obtaining access to the messages during specified hours but does not provide reasonable assurance that minors will be restricted during the hours when general access is permittted." *Id.* at 42704. The FCC found message scrambling to be technologically feasible and not to require any network modification. The cost of scrambling equipment ranged from $150 to $1000 for each originating facility. NYNEX noted that implementation of this scheme is relatively simple as it is based on a one-way transmission system, which is the system employed by NYT. Message scrambling, however, requires that adults who desire to hear messages install decoding devices that cost $15 to $20 each. The Commission also pointed out that scrambling schemes impose a 24-hour per day restriction upon adults who wish to hear the messages but do not have the appropriate equipment. The commission believed that a scheme that prevented minors' access to dial-a-porn by requiring all customers who wish to receive "adult" messages to be responsible for providing decoding equipment misallocated the burdens involved, and noted that the burdens on customers arising from implementation of a scrambling regulation are greater than those presented by other access-limiting schemes.

The Commission concluded that the most effective means of restricting access by minors to dial-a-porn services while at the same time minimizing restrictions on the rights of adults was to require providers of such service either to send messages only to those adults who first obtain an access or identification code from the service provider or, alternatively, to require the caller to pay for the call by credit card before access is obtained. Under an access and identification code requirement, dial-a-porn providers would be required to issue personal identification numbers or authorization codes to requesting adult customers. Although the Commission concluded that live operator intervention for such calls would be economically impracticable, it felt that an automated code-verification system would be feasible. Under such a system, transmission of dial-a-porn messages would not occur until an authorized access code was communicated by the subscriber to the service provider. Each message provider would develop its own access code database and implementation

scheme. Access or identification codes would be provided by mail to applicants "after 'dial-a-porn' providers reasonably ascertain that the applicant is at least eighteen years of age." *Id.* at 42705 (footnote omitted). The provider must use a written application procedure that seeks information such as the date of birth and credit card or driver's license number of the applicant. The provider would also have to implement a procedure to cancel codes that are reported lost, stolen, or misused. The Commission did point out that while use of the automated access code system would require that callers use dial-tone multifrequency telephones, rotary dialing equipment with ancillary tone equipment simulating tones made by multi-frequency telephones could also be used. Thus, that part of the public that apparently still has rotary telephones[4] could nevertheless access dial-a-porn messages by purchasing and installing a relatively inexpensive device.

The Commission noted NYNEX's strenuous objection to the access code system based on the assertion that such a system requries two-way transmission and is therefore technically infeasible in NYT's one-way dedicated network. In the NYT system, as noted *supra*, message providers supply recorded messages to a master center, which distributes the calls to subcenters on a "receive only" basis. The subcenters then transmit calls to the calling party. Although there is no two-way connection between the caller and the master center, the Commission rejected NYNEX's contentions, stating that nothing in the record indicated that an access code system could not be implemented at the master center. The FCC also stated that a service provider could "choose not to utilize 976 'dial-it' services," but rather could use the normal two-way telephone lines, without mentioning that no revenues would be earned by this alternative. 50 Fed.Reg. at 42705. In any event, the Commission found that the costs of any such systems should be borne by the service providers, not by the telephone companies or customers.

---

[4] This record does not indicate the percentage of New York customers served by rotary phones.

The Commission noted Carlin's response that access and identification codes would be economically and administratively impracticable where the viability of the system relies on the ability simulatenously to service multiple callers, but rejected this assertion as "not constitut[ing] an adequate factual basis upon which we can conclude that [such a] scheme would be more costly than any other alternative." *Id.* It also found that "[u]nder the guidelines set forth in *Carlin* [I] and in view of the absence of data suggesting financial impracticability, we find that an access code requirement is generally less burdensome to 'dial-a-porn' purveyors and less restrictive of adult's access to the messages than network blocking alternatives, time channeling or scrambling." *Id.* at 42706. As to concerns that adults would be reluctant to release personal information to the message providers in order to obtain the access codes, the Commission simply said that "[t]hese comments suggest that 'dial-a-porn' providers devise methods to quickly process access code applications and use advertisements or other means to educate their customers of the requirement." *Id.* n. 52.

As to the alternative of blocking at customer premises, the Commission followed up on the Second Notice's expectation that entrepreneurs could produce such devices, and noted that commenting parties indicated that such devices "have been developed and are becoming available at moderate prices." *Id.* at 42705. The Commission took note of several specific devices. Implicitly recognizing their technical and economic feasibility, the Commission said that they "quite apart from our regulation will assist parents in effectively supervising their minor children and limiting access to 'dial-a-porn' or other message services. . . ." *Id.*, at 42706. Nevertheless, it found that they did not constitute the least restrictive means of accomplishing the intent of Congress since they did not restrict minors' access to dial-a-porn services from telephones not so equipped. Moreover, in response to comments that the cost for such devices should not be imposed upon parents, the Commission stated, "Requiring telephone subscribers to purchase these devices misallocates the burden of implementing a restriction on access to 'dial-a-porn' services by minors." *Id.* It considered the access code a "less restrictive means." *Id.*

The Commission's final conclusion and the one Carlin challenges is that its access code regulation "represents the most effective available means to limit minors' access to the messages but, at the same time, offers the least restriction on adults' access." *Id.* at 42707 (footnote omitted). The Commission said that "[w]hile [the access code regulation] may incidentally restrict adults' convenience in accessing 'dial-a-porn' messages, we believe our regulation reaches just far enough to achieve Congress' mandate and to meet the court's constitutionality guidelines." *Id.* Again, limiting our decision to the situation presented by the NYT one-way telephone network, we disagree.

DISCUSSION

We reiterate the legal standard for analyzing the FCC's dial-a-porn regulations set forth in *Carlin I*, 749 F.2d at 121:

> because the regulation is content based – it does not apply to all dial-it services, but only to those transmitting obscene or indecent messages – we scrutinize it more closely.
>
> Under this more exacting scrutiny, we must determine whether the regulation precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. Such an interest must be served, however, only by "narrowly drawn regulations," that is, by employing means "closely drawn to avoid unnecessary abridgment." The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression. And the State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.

(Footnote and citations omitted.) *See also City of Renton v. Playtime Theatres, Inc.*, ____U.S.____, ____, 106 S.Ct. 925, 926, 89 L.Ed.2d 29 (1986)("regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment"). As we also stated in *Carlin I*, we will not consider the question of the constitutionality of the underlying statute if the FCC regulation is invalid facially or as applied. *Id.* at 118. Because we find that the record does not support the FCC's conclusion that the access code requirement is the least restrictive means to regulate dial-a-porn, we again do not address the constitutionality of section 223(b).

We think the Commission has failed adequately to consider the feasibility of shifting the cost of customer premises blocking equipment to the providers of services and/or the telephone companies that gain income from the calls. On the record before us, it may well be that the least restrictive means for complying with the congressional mandate lies in this now plainly feasible device available from various manufacturers. The TTC device, for example, operates without the need for equipment modifications, either in telephone company facilities, information provider premises, or residences, according to the Commission itself. Yet the only possibility to which the Commission addressed itself was that the telephone customer be required to pay for these devices.

We cannot understand why the Commission did not address the matter of transferring the cost of customer blocking to the providers/telephone companies as a feasible system to comply with the congressional mandate, especially in view of the Commission's decision to impose the cost of access code identification procedures on the providers. The Commission's failure is especially troubling in light of the feasibility problems of an access code wtih respect to the NYT one-way MAS network, which apparently does not permit the caller to communicate the access code to the telephone company or service provider.[5] The

[5] The Commission stated that "nothing in the record suggests that implementation of a software supported access code recognition system at the master distribution center in a one-way system such as NYNEX's would be infeasible."

(Footnote continued)

FCC stated that service providers "will have incentives to implement a code recognition system because it represents the most effective and least cumbersome means of satisfying the regulatory mandate." 50 Fed. Reg. at 42705. As the Commission

---

50 Fed.Reg. 42699, 42705 (1985). Alternatively, the Commission suggests parties wishing or needing to assert the defense "might simply choose not to utilize 976 'dial-it' facilities. Rather [they] may choose to implement access code recognition in two-way incoming trunks." *Id.*

The Commission's second "alternative" is rather peculiar since a provider not on the 976 network (such as "Dial-a-Prayer" in New York) does not receive revenues on incoming calls; the provider must have eleemosynary motives. One also might ask how many lines such a provider would need to take the place of the MAS 976 number, and what the effect would be on the central system to which such a provider is connected.

As to the first alternative, "implementation of a software supported access code recognition system at the master distribution center in a one-way system," we find no evidence in the record, and neither the Commission nor its brief point to any, that would support a finding of economic or technical feasibility. The only suggestion of technical feasibility is contained in the comments of Ameritech, which stated that in Illinois Bell's one-way system the caller connects to the central office and that the access code screening operations could be performed there. Ameritech noted that this procedure would involve the exchange carrier and would impose upon it prohibitive expense and administrative burdens. The FCC made no reference to Ameritech's statements concerning access codes. Moreover, in NYT's system, the caller connects to one of fifteen subcenters, not a central office. Even assuming the feasibility of locating the access codes at Illinois Bell's central office, as to which the FCC made no findings, there is nothing in the record to indicate feasibility in the NYT system. At the least, the Commission must show a " 'rational connection between the facts found and the choice made.' " *Bowman Transp., Inc. v. Arkaknsas-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962)); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947). On remand the Commission, if it is still seriously considering access code identification for the NYT MAS network, will no doubt wish to elaborate on the feasibility of such a system, especially on the availability of technology to permit its use on a one-way network in general and the NYT system in particular, as well as on the billing and cost problems referred to in the Comments of Pacific Bell and Nevada Bell, Ameritech, and USTA. We further note that the record is rather barren even as to the economic feasibility of access codes in two-way systems.

did not consider the alternative of cost-shifting of customer blocking devices to the service providers, however, the record is barren as to why the service providers would not equally have incentives to implement a customer blocking system, which surely is less cumbersome since it does not involve the purchase of ancillary tone devices for rotary dialing equipment, mailings, or written age identification and cancellation procedures.

In short, on the record before us, we are unconvinced that, as to the NYT system, the access code requirement is the least restrictive means for complying with the congressional mandate. Accordingly, we remand to the Commission for exploration of the alternative of shifting the cost of customer premises blocking equipment to service providers and/or telephone companies.[6]

In so doing, we do not rule out altogether, nor do we pass on the constitutionality of, the use of access codes for, as we have stated, this decision relates only to Carlin and the NYT system.[7] Moreover, after the two schemes and cost-shifting devices pertaining to each of them have been more thoroughly examined, it may be that the Commission will conclude that its order is after all the correct one for reasons that it may develop. We do not preclude it from such a conclusion, although we are not impressed by the fact that pay phones would not be

---

[6] We do not at this point decide whether the FCC has the authority, under section 223 or otherwise, to require the telephone companies, which receive significant revenues from dial-a-porn, to help pay for customer premises blocking equipment. We note that shifting the total cost onto providers/telephone companies may result in a certain amount of "free ridership" among customers who are interested in the device for reasons unrelated to blocking access to dial-a-porn. We therefore recommend that the Commission consider the deterrent effect of imposing a percentage of the cost on customers.

[7] The Commission's failure to consider shifting the cost of customer premises equipment makes it unnecessary for us to decide the constitutionality of the access code plan. That plan may very effectively prevent minors from accessing dial-a-porn, but we express our concern over the potential chilling effect of a written application and identification procedure. *See Talley v. California*, 362 U.S. 60, 64-65, 80 S.Ct. 536, 583-39, 4 L.Ed.2d 559 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S.Ct. 1163, 1174, 2 L.Ed.2d 1488 (1958).

covered by the customer blocking device system, as least in the absence of evidence contradicting the NYT study discussed *supra*. At the same time, the customer blocking device system does have the advantage of not hindering access by adults who wish to use these services or who would be deterred therefrom if required to place their name on someone's list.

Petition to review granted; regulation set aside as to the NYT MAS network.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[Gen. Docket No. 83-989; FCC 85-554]

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this action the Commission adopts a regulation in accordance with our statutory mandate to restrict access by minors to obscene or indecent telephone messages. This action provides a defense to prosecution under 47 U.S.C. 223(b)(1983) when the defendant has taken either of the steps set forth in the regulation to restrict minors' access to communications prohibited thereunder.

EFFECTIVE DATE: November 25, 1985.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Jacqueline E. Holmes, Common Carrier Bureau, Domestic Services Branch (202) 634-1860.

SUPPLEMENTARY INFORMATION:
List of Subjects in 47 CFR Part 64

Miscellaneous common carriers, Communications common carriers, Telephone.

Second Report and Order

In the matter of enforcement of prohibitions against the use of common carriers for the transmission of obscene materials; GEN Docket No. 83-989.

Adopted October 10, 1985.
Released October 16, 1985.
By the Commission.

Introduction

1. In this *Second Report and Order* the Commission seeks to respond to a court decision that found certain infirmities in the record supporting a regulation we issued pursuant to section 223(b) of the Communications Act of 1934 as amended, 47 U.S.C. 223(b). Section 223(b), *inter alia*, imposes fines on parties who knowingly use telephones or telephone facilities or allow telephones or telephone facilities under their control to be used to transmit obscene or indecent messages for commercial purposes to individuals under eighteen years of age. The section also requires the Commission to develop regulations which, in effect, restrict access by minors to the "dial-a-porn" messages.[1]

---

[1] In our *Notice of Inquiry*, 48 FR 43348 (September 23, 1983)(NOI), we described the "dial-a-porn" service that resulted in passage of the legislation as follows:

> High Society Magazine, Inc. and Car-Bon Publishers obtained the Dial-It number in a lottery for Dial-It numbers conducted by New York Telephone in January 1983. The number was thereafter advertised in "High Society Live!" magazine and, in February 1983, operation of the service commenced. When the number is dialed, the caller hears a description or depiction of actual or simulated sexual behavior. The messages, *which are changed at least once daily, are available to any caller, twenty-four hours a day, every day.* As the local common carrier, New York Telephone does not operate the message service but provides the Dial-It service capability pursuant to an intrastate tariff filed with the Public Service Commission of New York. That tariff, which applies to all New York Telephone Dial-It services, explicitly provides that the subscriber has exclusive control over the content and quality of the messages recorded and that the telephone company assumes no liability therefor.
>
> The Dial-It number operated by High Society has apparently been widely disseminated and called. Sources calculate that the service receives up to 500,000 calls a day, yielding approximately $10,000 for High Society and $35,000 for New York Telephone per day before costs. (Citations omitted and emphasis added.)

(Footnote continued)

In a *Report and Order* adopted June 4, 1984, 49 FR 24996 (June 19, 1984), the Commission promulgated a regulation after reviewing comments and reply coments and a *Further Notice of Inquiry and Notice of Rulemaking* (NPRM), 49 FR 2124 (January 18, 1984).[2] On November 2, 1984, the United States Court of Appeals for the Second Circuit found that the Commission had failed to justify the regulation adequately, *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2nd Cir. 1984)(*Carlin*). By a *Second Notice of Proposed Rulemaking*, 50 FR 10510 (March 15, 1985)(*Second Notice*) the Commission solicited further comments in response to the court decision. Specifically, the *Second Notice* sought comments regarding technical means to restrict minors' access to "dial-a-porn"

As was further explained,

Pursuant to the local tariff for Dial-It services, prior to May 1983 High Society received $.02 for each local call while New York Telephone received $.07 (of which $.0696 is estimated as New York Telephone's cost). As of May 1983, High Society continued to receive $.02 per call, but New York Telephone's revenue per local call increased to $.13 (and its average cost to $.114) *See* New York Telephone P.S.C. Tariff No. 900 13 at 25. High Society also receives $.02 for each long distance call. The long distance carriers and local carriers divide the remaining long distance revenues.

NOI, 48 FR at 43349, n. 7.

We note that it is more accurate to refer to the "dial-it" service as the *Mass Announcement Network Service* (MANS), but the parlance has become accepted and is used throughout this proceeding. It should also be noted that although other MANS messages may be reached by dialing a variety of numbers, all Mass Announcement Network Services in the State of New York are on a 976 exchange and can be accessed locally or through an interexchange carrier. *See* Report and Order, 49 FR 24996, n. 6.

[2] The Commission is required to adopt regulations pursuant to section 223(b)(2) of the Act, which provides:

It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

services. We now discuss and analyze these most recent comments and adopt a final regulation based on the entire record.[3]

Background

2. The "dial-a-porn" proceeding initially came before the Commission by way of a complaint filed by Peter F. Cohalan[4] and a Petition for Declaratory Ruling filed by Multipoint Distribution Systems, Inc. (MDSI).[5] The complaint, filed March 17, 1983 by Cohalan individually and as County Executive of Suffolk County in New York, alleged that New York Telephone Company violated 47 U.S.C. 223 by permitting High Society Magazine to use telephone company facilities to transmit obscene messages. New York Telephone Company's reply denied that the

---

[3] The following parties submitted comments and replies in response to the *Second Notice:* American Civil Liberties Union (ACLU); American Telephone & Telegraph (AT&T); Ameritech; BellSouth; Bell Atlantic; Carlin Communications, Inc.; Cincnnati Bell, Inc.; Congressman Thomas Bliley; Contental Columbia Public Service Commission; Home Box Office (HBO) and American Television and Communications Corp. (joint comments); Minnesota Attorney General; Morality in Media; Mountain States Bell, Northwestern Bell and Pacific Northwest Bell; New York Department of Public Service; Pacific Bell and Nevada Bell; Pennsylvania Public Utilities Commission; Phone Programs and Info Line, Inc. (joint comments); Productions-by-Phone; Southwestern Bell; Tel Control; Telecommunications Technology Corp. (TTC); United States Catholic Conference; and United States Telephone Association (USTA). Late-filed comments were submitted by New York and New England Telephone (NYNEX). NYNEX's motion for acceptance of these comments is hereby granted. Late-filed reply comments were submitted by Telecommunications Research and Action Center (TRAC). TRAC's comments are treated herein as informal comments. Other informal comments are too numerous to be listed here. All submissions were full considered, however, and constitute part of the record of this proceeding.

[4] In the Matter of Peter F. Cohalan and the County of Suffolk, New York v. New York Telephone Company, FCC File No. E-83-14 (March 31, 1983).

[5] Petition for Declaratory Ruling filed by Multipoint Distribution Systems, Inc., FCC File No. CCB DFD 83-2 (June 14, 1983).

communications were obscene in nature and claimed as an affirmative defense that sanctions under section 223 were inapplicable because the Company did not itself make or knowingly transmit the telephone calls. The Commission dismissed the Cohalan complaint without prejudice based on its determination that Section 223 was penal in nature.[6] It referred to the Department of Justice for possible criminal action. Cohalan then filed an application for review of the Commission's dismissal of his complaint.[7] New York Telephone opposed Cohalan's application, asserting that as a common carrier it was not subject to Section 223 because it did not make or knowingly permit its facilities to be used to make proscribed calls. Meanwhile, the Department of Justice determined that the matter was best suited for administrative treatment and returned the matter to the Commission for administrative action.[8]

3. On September 9, 1983, the Commission initiated its NOI to resolve issues concerning its authority to regulate "dial-a-porn" transmissions under section 223.[9] In its NOI, the Commission sought to determine whether telephonic communication of obscene or indecent messages could or should be proscribed pursuant to section 223, and, if so, the extent of the proscription that should be taken. The Commission invited public comment on whether it could enforce regulations prohibiting "dial-a-porn" against common carriers and message service

---

[6] Memorandum Opinion and Order, FCC File No. E 83-14 (May 16, 1983).

[7] Applications for Review of the Commission's dismissal of the Cohalan complaint were also submitted by Congressman Bliley (June 14, 1983) and Hubert H. Humphrey, III, Attorney General of Minnesota (September 6, 1983). Both Applications were reviewed and considered by our staff, though the latter submission was untimely filed.

[8] Letter from Richard Willard, Civil Division, Department of Justice, to General Counsel, Federal Communications Commission dated June 10, 1983.

[9] In a related matter, forty-six members of Congress, including Congressman Bliley, sent a letter on May 6, 1983 to Chairman Fowler encouraging the Commission to act rapidly to prevent the proliferation of "dial-a-porn" services.

providers under the unamended section 223 and whether common carriers could unilaterally decide that material to be transmitted is obscene and terminate the transmissions based upon their determinations pursuant to statute, tariff, or contractual agreements. Shortly thereafter, Congress amended section 223 of the Communications Act.[10] The Commission was required to issue regulations within 180 days restricting access by minors to the services encompassed by the amendment. Compliance with the regulations would constitute a defense to prosecution under the statute.[11]

---

[10] Section 8 of the Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, effective December 8, 1983.

[11] Section 223 was amended to include subsection (b) as follows:

(b)(1) Whoever knowingly–

(A) In the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) Permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) It is a defense to prosecution under this subsection that the defendant restricted access to the prohibited communications to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

(3) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate of foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District of Columbia or in Interstate of foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either–

(i) By a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(Footnote continued)

4. On November 28, 1983, Congressman Bliley filed a Petition to Institute Forfeiture Proceedings against Drake Publishers, Inc. (Drake), alleging that Drake violated the unamended statute. Congressman Bliley subsequently sought retroactive application of the amended statute's increased penalties. In its NPRM, the Commission noted that the amended statute seemed to resolve affirmatively questions its predecessor left unanswered concerning the Commission's authority to prohibit obscene telephonic transmissions whether or not the utterer of the statement initiates the transmission. Other questions, however, were left unanswered. The NPRM invited suggestions concerning means to effectuate Congress' mandate in the most technologically and economically feasible manner. In the resulting *Report and Order*, the Commission found that liability under the statute requires, as a preliminary matter, that alleged violators actively participate in providing the messages. After full consideration of the record, the Commission promulgated 47 CFR 64.201[12] which reads as follows:

(ii) By the Commission after appropriate administrative proceedings.

(5) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

[12] The Commission was under statutory mandate to resolve all complaints filed pursuant to unamended section 223, no later than 90 days after the effective date of amendment. *See* section 8(d) of the Federal Communications Commission Authorization Act of 1983, Pub. Law No. 98-214, effective December 8, 1983.

The Commission consolidated the Cohalan Complaint and the Bliley Petition and found that the unamended Statute was inapplicable to common carriers because 47 U.S.C. 223(1)(A) applies only to persons who utter obscene or indecent words during calls they place, or who are actively involved with the "dial-a-porn" statute. *See* In the Matter of Application for Review filed by Peter F. Cohalan and the County of Suffolk, New York Against New York Telephone Company and Petition to Institute Forfeiture Proceedings Filed by Congressman Thomas J. Bliley, Jr. Against Drake Publishers, Inc., FCC 84-76 (March 7, 1984).

(Footnote continued)

64.201 Restrictions On Obscene or Indecent Telephone Message Services.

It is a defense to prosecution under section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. 223(b), that the defendant has taken either of the following steps to restrict access to communications prohibited thereunder:

(a) Operating only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time, or

(b) Requiring payment by credit card before transmission of the message(s).

(5) The United States Court of Appeals for the Second Circuit set aside the Commission's regulation. Because the statute reaches indecent as well as obscene communications,[13] the court assessed the Commission's regulation under traditional first amendment standards. The court held that regulation of "dial-a-porn" messages is content-based, and is therefore subject to exacting judicial scrutiny to determine whether it is a "precisely

---

Subsequently, in a letter by direction of the Commission to the Department of Justice with regard to its denial of the dismissal of the Cohalan complaint, the Commission stated:

This action was taken on the basis of our belief that 47 U.S.C. 223 (1)(A) only applies to persons who utter obscene or indecent words during calls that they place, not to recorded message services which only receive calls. At the same time, we recognize that the United States Department of Justice has authority to enforce (the) section. . .which is independent of the Commission's role in administering that statute. Our *Order* was thus not intended to impede the Department's prosecution of individuals it believes to be engaged in activity in violation of that statute, (Footnote omitted.)

Letter from General Counsel, Federal Communications Commission, to Brent Ward, U.S. Attorney, District of Utah, dated June 14, 1985.

[13] The court, citing Miller v. California, 413 U.S. 15, 23 (1973), recognized the Supreme Court's holding that obscene expression is unprotected by the first amendment. *Carlin* at 119.

drawn means of serving a compelling state interest." *Carlin*, at 121, quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Thus, the court concluded that the Commission's regulation will withstand constitutional review only if it is closely drawn to the compelling governmental interest of protecting minors from salacious telephonic communications and does so in a manner which avoids unnecessary abridgement of adults' access to the "dial-a-porn" messages. The court further suggested that the Commission might not regulate the "dial-a-porn" messages if even the least restrictive means of regulation available is unreasonable in light of the benefits to be gained balanced against the limitations imposed upon speech. With respect to the rule adopted by the Commission, the court found that the Commission had failed to demonstrate adequately that limiting operational hours of "dial-a-porn" service providers effectively restricts minors' access to the sexually explicit transmissions without, at the same time, unduly impairing the rights of adults to hear the telephonic messages. The court did not reach the constitutionality of the underlying statute, but focused instead on the effect of the Commission's regulation, stating that:

> [T]he [time channelling] regulation [adopted by the Commission] denies access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours. . . . [and] a young person needs to be unsupervised only about ninety seconds in order to dial the number and hear the message.

Carlin, at 121. The court found that the Commission rejected certain alternatives without providing a comprehensive record demonstrating that they were not more effective in controlling minors' access and less restrictive of adults' ability to hear the recordings than the regulation issued. On this basis, it set aside the Commission's regulation.

6. In response, the Commission initiated the *Second Notice* to solicit supplemental information to cure the record's infirmities. Parties were invited to provide information, comments and suggestions relating to the required regulation and the

concerns raised in *Carlin*. Specifically, parties were asked to comment upon four general approaches by which minors' access to "dial-a-porn" services might be restricted: Screening and blocking, access and identification codes, limiting operational hours of the service, and bill modification. Parties were instructed to consider a variety of workable schemes entailed by each approach, including effectiveness, technical feasibility and economic practicability of each scheme.

7. After careful consideration of the record in this proceeding, including the *Carlin* decision and the comments submitted in response to the *Second Notice*, we conclude that the most effective means to restrict access by minors to "dial-a-porn" services, while at the same time minimizing restrictions on the rights of adults to hear the messages, is to require providers of such services either (1) to provide messages only to those adults who are first provided an access or identification code by the service provider, without which access to the messages is impossible, or (2) to require the caller to provide payment to the service provider by a credit card before access is obtained.[14]

8. The Commission is required to promulgate technically and economically feasible regulations which, taking into consideration the operation of "dial-it" services, restrict minors' access to "dial-a-porn" messages but are the least restrictive of consenting adults' ability to hear the messages. The following discussion focuses on constitutional, technical, and economic considerations regarding proposals to restrict minors in the use of residential telephones to access recorded "dial-a-porn" messages. Additional issues arise when minors seek access to recorded "dial-a-porn" messages from coin-operated telephones, and when live messages are involved. These matters are discussed separately.

Screening and Blocking

9. One approach to restrict access by minors to "dial-a-porn" messages involves using technical means to screen or block[15]

---

[14] Visa, American Express, MasterCard, and Diner's Club typify such credit cards.

[15] Screening and blocking refer generally to technical methods by which calls to specific numbers or groups of numbers cannot be completed.

calls to certain preselected telephone numbers. In our *Report and Order*, we discussed various blocking schemes, some implemented at central offices and others accomplished by blocking technology deployed at information provider premises. We found that the technical means for screening and blocking had not yet been developed as practical regulatory alternatives.[16] Nevertheless, the Second Circuit found that the Commission did not adequately address screening options. *Carlin*, at 119-23. Accordingly, in order to supplement the record, in the *Second Notice* the Commission invited comments on detailed technical variations of these options. We will discuss each of these.

10. *Network blocking.* Network blocking refers to means by which certain outgoing telephone calls are impeded at telephone company central offices. By way of introduction, we note that blocking schemes include exchange blocking (3 or 4 digit blocking), line number blocking (7 digit blocking) and equal access number reporting (10 digit blocking). Blocking by use of these techniques would require software modifications in Stored Program Control (SPC) offices, and would require customer reassignments or equipment upgrades (i.e., installation of additional registers, relays and other facilities) in electromechanical central offices.[17]

11. The Second Circuit found that the Commission did not adequately address exchange blocking as a regulatory alternative.

---

[16] *Report and Order*, 49 FR at 24998-99.

[17] Because electromechanical offices are equipped with progressive control switches which are incapable of storing data, these offices are not capable of performing blocking using schemes based on numbers dialed. Implementation of such schemes at electromechanical offices would, therefore, require that additional facilities be constructed or that customers be reassigned to SPC offices capable of blocking outgoing calls. AT&T estimates that of the 20,000 local switching office (9,000 of which are owned by BOCs and 11,000 owned by independents) approximately 30% or 6,000 are SPC offices and the remaining offices are electromechanical. AT&T uses the term "electronic switching system," or ESS, for their SPC switches. *See generally* AT&T Comments. Telephone company comments generally note that SPC offices serve 70% of existing subscriber lines.

Carlin, at 119. We will address that alternative in greater detail, using the augmented record now before us.[18] Exchange blocking, which would block all "dial-it" calls now placed through the 976 exchange, is implemented differently at SPC and electromechanical offices. In SPC offices exchange blocking requires software modifications that divide existing services into two classes: those that are designed to restrict 976 access and those that are not. Subscribers may then choose their class of service to achieve the desire blocking.[19]

12. Most electromechanical offices, including step-by-step and crossbar offices, are not equipped to perform exchange blocking. Implementing 976 exchange blocking for step-by-step electromechanical offices would require telephone companies to separate line groups, reassign customers who request exchange blocking to the newly created line groups, and construct new trunk lines to serve these customer groups. Crossbar electromechanical switch offices would require installation of additional mechanical relay banks capable of blocking particular exchanges.[20] Although exchange blocking would effectively

---

[18] Exchange blocking generally refers to three digit blocking. In its comments, however, Ameritech addresses the alternative of adopting a four digit blocking scheme wherein "dial-a-porn" services are migrated to a designated number series (i.e. 976-NXXX) and calls to this discrete number series are blocked upon customer request. Ameritech gives no estimate of the total implementation cost of four digit blocking but states that implementation in its Detroit area alone would cost millions of dollars. Ameritech comments at 12.

[19] As noted at note 17, *supra*, approximately 70% of existing subscriber lines are served by SPC offices. Implementation of exchange blocking in SPC offices would cost about $100 for each new class of service plus $90.00 for translation costs and $20-45.00 for processing each customer service order. These costs would be accrued for each class of service in each central office. *See* comments of Pacific Bell and Mountain States, Northwestern and Pacific Northwest Bell. Ameritech states that the estimated implementation cost of all exchange blocking in the Detroit area alone would be $200,000-300,000. *See generally* Ameritech comments.

[20] Blocking is feasible only in wire spring No. 5 crossbar offices with a sufficient number of available classes of service. *See* Ameritech comments at 9, Mountain States Bell, Northwestern Bell and Pacific Northwest Bell comments at 11, Bell Atlantic at comments 3 and Bell Atlantic's Appendix at 1-2.

preclude minors from obtaining access to "dial-a-porn" messages from particular telephones, the substantial costs entailed by telephone companies in restricting calls to particular exchange outweigh the benefits that would reasonably be expected.[21] Apart from any policy or legal infirmities associated with assigning responsibility for "dial-a-porn" access to common carriers, the augmented record before us demonstrates that exchange blocking as a regulatory option is both economically and technically infeasible.

13. Further, exchange blocking would block all "dial-it" messages, not just "dial-a-porn" messages. *See Carlin*, at 122 n.14. We find it unnecessarily restrictive to require those who want to limit access to "dial-a-porn" service also to limit access to all "dial-it" services.[22]

The *Carlin* court noted that:

[b]locking 976 exchange calls raised other problems. In order to prevent calls to the dial-a-porn numbers the subscriber would not be able to receive the weather dial-it service or other concededly First Amendment protected information. Nevertheless, without intimating our views were such a regulation adopted, the subscriber would make the choice.

Carlin, at 122. We find that a regulation adopting exchange blocking would be constitutionally flawed because it would block all "dial-it" messages.

---

[21] NYNEX, for example, estimates that making crossbar central offices in New York capable of performing exchange blocking would cost at least $35 million. NYNEX comments at 28.

[22] A regulatory alternative which shifts the entire cost of exchange blocking to "dial-it" information providers would jeopardize the entire "dial-it" industry. The Commission notes the concerns of commenting parties who urge us to avoid regulatory alternatives which adversely affect the rights of "dial-it" information providers not engaged in the dissemination of pornographic messages. Comments of Carlin at 9; HBO and American Television and Communications Corp. comments at 5; District of Columbia P.S.C. comments at 2-3; Minnesota Attorney General comments at 10; USTA comments at 8-9; Phone Programs and Info Line comments at 26; Dial Info comments at 3; AT&T reply comments at 4.

14. Finally, although the majority of MANS (Mass Announcement Network Service) numbers are currently assigned to 976 exchanges, there is no legal or technical requirement to use that or any other exchange. New York Telephone, for example, has explored the possibility of using additional prefixes to expand its MANS network.[23] MANS information providers in Maryland, Michigan, and New York use the 249, 949, and 929 prefixes, respectively. Other private announcement services (e.g., Dial-a-Prayer in New York) operate independently of telephone company MANS facilities by using regular telephone lines connected to announcement equipment located on the information provider's premises. As a result, any exchange blocking regulation would limit minors; as well as adults' access to particular exchanges, but messages located on the unblocked exchanges would remain accessible. Thus, such a regulation would be ineffective in meeting the Congressional mandate to restrict minors' access to "dial-a-porn" messages.

15. We now turn to a discussion of line number (seven digit) blocking. Blocking calls from particular numbers to other predesignated numbers (upon customer request) may be accomplished at some central offices through a process of line number blocking using a recently innovated service commonly referred to as Customer Local Area Signalling Service (CLASS). Our *Second Notice* solicited comments regarding a CLASS calling feature which permits subscribers to request that calls from their residential lines be denied access to particular "dial-a-porn" numbers.[24] Implementation of these subscription screening

---

[23] NYNEX comments at 12.

[24] *Second Notice*, 50 FR at 10,513, para. 11. In a letter to Bell Communications Research Inc. (BellCore) dated June 13, 1985, and served upon parties of record in this proceeding, the Commission sought supplemental information regarding the use of CLASS features to provide a subscription screening service. BellCore's response, which essentially reiterated information supplied by telephone company commenters, is incorporated in this discussion. The subscription service would operate by requiring telephone companies to process screening requests received from customers. Bell Atlantic is currently field testing CLASS features capable of serving customers with up to four lines. Bell Atlantic's CLASS features will permit blocking of up to three numbers per line. Bell Atlantic Appendix at 2. BellSouth's CLASS blocking feature will be able to block up to 30 individual numbers. It plans to begin deployment of CLASS features in its electronic offices by 1987.

services requires that the originating, intermediate, and terminating central offices through which calls are routed be equipped with CLASS and Common Channel Signalling [CCS] facilities.[25] Telephone companies commenting on the use of the CLASS call block feature as a screening service state that, although feasible, CLASS is currently experimental in nature. Implementation of CLASS entails an expensive process which is not expected to be generally available prior to 1987. Current plans limit the blocking capacity of each central office to thirty individual numbers. Seven digit blocking would be ineffective in meeting the Congressional mandate to restrict minors' access to the "dial-a-porn" messages because CLASS is not yet universally available. Even when CLASS is fully implemented by local telephone companies, minors need only seek unsupervised telephones in residences where customers do not subscribe to the screening services to gain access to the messages. Further, the CLASS blocking feature is not adedquate to handle the large number of "dail-a-porn" systems currently in operation. Based on these considerations, we find that seven-digit blocking schemes based on CLASS or centrex-like screening features do not now represent technically and economically viable options.

16. Another method by which minors may be prevented from obtaining access to "dial-a-porn" messages is by use of equal access (ten digit) number forwarding. In the *Second Notice*, the Commission sought information regarding use of a ten digit equal access number forwarding scheme to restrict access by minors to "dail-a-porn messages.[26] This scheme would require local exchange carriers to forward ten digit originating and terminating numbers to interexchange carriers which would compare the numbers with those numbers in a database. If the numbers match, the call would not be completed. Implementation would require that each central office be equipped with

---

[25] CCS facilities are used to transmit call setup information between SPC offices for a group of trunks over a single dedicated high-speed data link, rather than an individual trunk basis.

[26] *Second Notice*, 50 FR at 10512.

equal access capacity. In addition, the interexchange offices must subscribe to Feature Group D or use switches capable of receiving and storing Feature Group D information, including the numbers to be blocked. We note that as a result of the *MTS and WATS Market Structure Proceeding*, CC Docket No. 78-72 (Phase II) (March 19, 1985), many BOCs are installing SPC equipment capable of number forwarding. Nevertheless, number forwarding is not expected to become available on a nationwide basis for some fifteen years.[27] Even then, use of the equal access number for screening purposes will be limited to interexchange calls.

---

[27] Pacific Bell does not plan to implement these features in electromechanical central offices or in sparsely populated areas. It states that even in its electronic offices use of number forwarding screening features will not be possible prior to 1993. Pacific Bell comments at 12. Bell Atlantic states that number forwarding would be a feasible alternative in areas served by interexchange companies with switches capable of receiving the screening information. Bell Atlantic comments, Appendix A, at 2. NYNEX states that number reporting in its region is not likely to be available for at least 15 years. It estimates equipment costs to provide the feature at over $6.7 million. NYNEX comments at 31. Cincinnati Bell states that number forwarding will become economically viable only if a majority of customers in each service area orders the screening service. Cincinnati Bell comments at 2. Ameritech States that by 1997, 92% of its access lines will be converted to equal access and thus capable of performing number forwarding. It asserts, however, that use of number forwarding to screen calls gives rise to prohibitive costs, and forces customers who desire to refrain from contact with the services to disclose private personal information to "dail-a-porn" service providers. Ameritech at 15. According to BellSouth, automatic number forwarding in its region will be provided to interexchange carriers other than AT&T by electronic end offices converted to equal access. It expects conversion by 1986 but notes that the screening capability will depend upon whether the interexchange carrier subcribes to Feature Group D. BellSouth comments at 8. Contel asserts that the increased burden that screening and blocking regulatory alternative would place on independent telephone companies outweighs any benefits obtained. It estimates its equal access implementation costs to be $990 million. Contel at 3-5. TCI's comments describe an Equal Access Adapter System [EAAS] capable of restricting outgoing calls from local exchange and interexchange offices. Equipment necessary to implement its EAAS is priced at $500 per trunk and costs $5000 to implement at each office. The system requires each central office to utilize an IMB-compatible personal computer. *See generally* TCI comments.

17. In sum, we conclude that network exchange blocking is flawed because it would restrict access to all "dial-it" services provided within the exchange. Other, newly innovated network blocking technologies, *e.g.* CLASS and centrex-like blocking features, and equal access number reporting, may become viable options at some future date, but all now fail to meet the Congressional mandate because they are not yet available. We will continue to monitor the development of these blocking schemes and will be prepared to consider them as regulatory alternatives in the future.

18. *Blocking implemented at premises of "dial-a-porn service" providers.* Methods which may be used to block "dial-a-porn" messages at the information provider's premises include time channeling, message scrambling, and access and identification codes. Each is analyzed below with emphasis on the information submitted in response to our *Second Notice.*

Other Options

19. *Time Channeling.* In our *Report and Order,* we considered the feasibility of limiting the operation of "dial-a-porn" messages to a time period during which parents are available to supervise their children. We concluded that, in light of the absence of viable technical blocking alternatives, time limitations would effectively restrict access by minors during hours when they are less likely to be closely supervised, and would be least restrictive of the rights of adults to hear the messages.[28] We determined that although adults as well as minors would be denied access during restricted hours, time channeling permits adult access during the remaining portion of the day. We found, further, that operational hour limitations were less restrictive than network blocking arrangements. The Second Circuit, however, found that the Commission failed to adequately demonstrate that time-channeling was the most effective means to restrict minors' access to the messages and the least restricitive of adults' access to "dial-a-porn."

---

[28] *See Generally Report and Order,* 49 FR 24996 (1984).

20. The Second Circuit expressed concern regarding the financial viability of "dial-a-porn" services providers under a time-channeling restriction[29] but, as the Court itself noted, it is the relative effect, when weighed against the other regulatory alternatives, that determines the type of regulation we should promulgate to restrict minors' access.[30] Time channeling would restrict minors' access during non-school hours when minors are presumably unsupervised for longer periods of time. However, as we noted in our previous consideration of the matter, clever minors are likely to circumvent our rule during the remaining unrestricted hours. Indeed, the court observed that "a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message." *Carlin*, at 121. We must therefore compare the relative effectiveness of time-channeling with other regulatory options. While time channeling is generally less burdensome on access than are network blocking, scrambling or other technologically implemented schemes which would be in effect on a 24 hour per day basis and would require network modification, time channeling is flawed in that it prevents adults from obtaining access to the messages during specified hours but does not provide reasonable assurance that minors will be restricted during the hours when general access is permitted. Thus, time channeling does not represent the least restrictive means to prevent access by minors to "dial-a-porn" services under the Second Circuit's standards. Accordingly, based on the augmented record before us and our consideration of the relative effectiveness of alternative regulatory options, we will no longer rely on an operational hour limitation to meet the Congressional mandate.

---

[29] The Court stated that "(t)he FCC embraced the time-channeling scheme in the face of an argument by Carlin that it will have a disastrous financial effect . . ." *Carlin*, 749 F.2d at 123. It noted that experience with "dial-a-porn" services during the past year might provide the Commission with data regarding Carlin's assertions. Our *Second Notice* sought such data. Carlin, however, provided no detailed financial documentation in support of its claim. *See generally* Carlin Comments and Reply Comments.

[30] *Carlin*, 749 F.2d at 121-23.

21. *Message Scrambling.* Message scrambling refers to a technology by which a master scrambler installed at the premises of a message provider performs functions disassembling the intelligence of the outgoing messages. Consenting adults authorized to receive the message use descrambling devices installed at their premises to reassemble the messages, making them intelligible. The procedure does not require network modification,[31] but requires that adults who desire to hear the messages install decoding devices. AT&T states that the technology required to implement scrambling, which shifts the frequency distribution of the audio transmission, is currently available. It estimates that the cost of equipment necessary to implement scrambling schemes ranges from $150-1000 for each originating facility, and that decoders are available at $15-20.00 each.[32] NYNEX notes that implementation of his scheme is relatively simple as it is based on a one-way transmission system.[33]

22. Although comments indicate that message scrambling is technologically feasible, scrambling schemes effectively impose a 24 hour per day restriction upon adults who wish to hear the messages but do not have the appropriate descrambling equipment.[34] Implementation of a scrambling requirement gives rise to additional difficulties with respect to allocation of the cost of obtaining and the responsibility for installing and maintaining the descrambling devices and scrambling equipment. Under the analysis relied on by the Second Circuit, requiring all subscribers to be responsible for providing decoding equipment to avoid minors' access to "dial-a-porn" messages misallocates

---

[31] NYNEX points out that incidental costs would be incurred by local exchange companies as a result of customers who request service calls upon their mistaken assumption that the scrambled message indicates line-related defects. NYNEX concedes, however, that these costs are relatively insignificant. NYNEX comments at 42.

[32] AT&T Comments at 9.

[33] NYNEX Comments at 42-43.

[34] *See generally* Comments of HBO and American Television and Communications Corp., Ameritech, and Carlin.

the burdens involved. The burdens associated with implementing a scrambling regulation are greater on customers than those presented by other access limiting schemes. Further, a scrambling requirement would prevent adults from obtaining access to recorded messages from coin operated or pay telephones that are not equipped with decoding devices. On the other hand, pay telephones equipped with decoding devices would be readily accessible to minors. We find, therefore, that scrambling is overbroad and unreasonably intrusive upon adults' ability to hear the "dial-a-porn" messages.[35] For these reasons, we reject the scrambling alternative under the guidelines of the court decision.

23. *Access and Identification Codes.* Access and Identification codes are an approach by which "dial-a-porn" providers issue personal identification numbers or authorization codes to requesting customers after ascertaining the customer's age. The codes, which may be credit card numbers or other identification numbers devised by the message provider, must be provided by callers before access to the messages is granted. This process may involve a live operator or an automated verification system that responds to telephone dialing tones. Early in this proceeding we examined the practicality of operator intervention in the case of recorded messages. We noted that "dial-it" services simultaneously serve a multiplicity of callers. Thus, we concluded that requiring operator intervention for each call would be economically impracticable.[36] Since nothing in the augumented record before us suggests that this conclusion is no longer valid, the discussion that follows is made with reference to an automated code verification system.

24. Under an automatic access code system, calls to local telephone exchanges would be directed to "diai-a-porn" service provider facilities and transmission of the messages would not

---

[35] *See* Smith v. California, 361 U.S. 147, 150-51 (1959) *reh'g denied*, 361 U.S. 950 (1960).

[36] *Report and Order*, 49 FR at 24998-99.

occur until an authorized access code were provided.[37] Within the limitations discussed herein, authorization would be entirely within the control and responsibility of the "dial-a-porn" message provider. Each message provider would develop its own access code database and implementation scheme. Implementation schemes would include a written age ascertaining procedure and a procedure to be used to cancel access or identification codes that are reported lost, stolen or misused. Authorized access or identification codes would be provided by mail to applicants after "dial-a-porn" providers reasonably ascertain that the applicant is at least eighteen years of age.[38] Use of the access codes would require that callers use dial tone multi-frequency telephones, or rotary dialing equipment with ancillary tone equipment.[39]

---

[37] Pacific Bell asserts that the automatic decoding and billing system it uses may facilitate the implementation of an access code requirement by routing calls directly to "dial-a-porn" information providers. It estimates that it would incur incidental costs ranging from $200,000 to $300,000 to upgrade its network to accommodate the increased holding time that may result when callers use access codes. Pacific Bell comments at 4. However, telephone company comments generally state that such costs should be borne by "dial-a-porn" service providers. *See generally* comments of AT&T, Ameritech, BellSouth, NYNEX, Pacific Bell and USTA. Under the approach we adopt here, it is anticipated that the "dial-a-porn" provider will be responsible for the costs associated with the defenses reflected in our rule. *See* Appendix.

[38] *Carlin* indicates that because parents have "substantial control of the disposition of mail once it enters their mailboxes" and will presumably intercept access codes distributed by mail, a system of age verification may be unnecessary when access codes are distributed by mail. *Carlin* at 123, quoting Bolger v. Youngs Drug Products Corps., 463 U.S. 60, 70-75 (1982). Our regulation requires "dial-a-porn" providers to reasonably ascertain the age of the applicant. To do so, "dial-a-porn" providers must use a written application procedure which seeks information such as the date of birth and credit card number or driver's license number of the applicant. To further ensure that minors are prevented from obtaining access codes from "dial-a-porn" providers, we will require that the codes be distributed by mail.

[39] Ancillary tone devices which simulate tones made by multi-frequency telephones are commercially available for several dollars and are widely used

(Footnote continued)

25. NYNEX indicates that an access code system requires two-way transmission between the service provider and telephone company facilities. NYNEX states that recorded messages routed through the New York metropolitan MANS network are not transmitted directly to callers. Instead, message providers supply recorded messages to a master center. The master center distributes the calls to subcenters on a "receive only" basis. The subcenters then transmit calls to the calling party. Thus, NYNEX asserts that a regulation requiring "dial-a-porn" service providers to install access code recognition is technically infeasible in a one-way dedicated network.[40] NYNEX's argument may be meritorious were the access code requirement to be implemented at the service provider's premises. However, nothing in the record suggests that implementation of a software supported access code recognition system at the master distribution center in a one-way system such as NYNEX's would be infeasible. Indeed, comparable modifications to the programmable central office switches are intrinsic to the proposal of other carriers herein. Alternatively, parties that wish (or need) to assert the defense made available in this order might simply choose not to utilize 976 "dial-it" facilities. Rather these parties may choose to implement access code recognition in two-way incoming trunks. However, alternative non-porngraphic uses of the few 976 facilities abandoned thereby would likely arise rapidly. In any event, we believe that the costs of any such systems should be borne by the service providers, not by the telephone companies or other subscribers. We conclude that NYNEX's "dial-a-porn" service providers will have incentives to implement a code recognition system because it represents the most effective and least cumbersome means of satisfying the regulatory mandate.

26. In our *Report and Order*, we accepted unsupported contentions by message providers asserting that an access code requirement is impracticable.[41] No party in this proceeding has

---

to access OCC services. Adults wishing to access "dial-a-porn" messages from rotary telephones may purchase and easily install such devices.

[40] NYNEX comments at 41.

[41] *Report and Order*, 49 FR at 25000.

offered definitive cost figures for the equipment needed by "dial-a-porn" providers to implement an access code scheme, though we solicited that information and fully expected providers to respond. Carlin did say in response to our *Second Notice* that "[a]ny access and identification code procedure would economically and administratively impracticable where the viability of the system relies on the ability to simultaneously service multiple callers."[42] This assertion does not constitute an adequate factual basis upon which we can conclude that an access and identification code scheme would be more costly than any other alternative. Interestingly, in its June 14, 1984 petition to stay the effective date of the regulations initially issued by the Commission pursuant to section 223(b), Carlin stated that 74.3% of the calls to its "adult-entertainment" services occurred between 8:00 a.m. and 9:00 p.m. Thus, an access code requirement would permit the operation of such services during the most active hours and would provide opportunities to recoup implementation costs.

27. *Blocking implemented at customer premises (Terminal Equipment).* In our *Report and Order*, we concluded that "no existing commercial device has a screening capability that could be deployed within the subscriber's terminal equipment."[43] Subsequently, we expressed the expectation that entrepreneurs in the competitive marketplace may produce such devices in response to the concerns of parents who wish to monitor their children's use of residential telephones to access "dial-a-porn" messages.[44] Commenting parties indicate that such devices have been developed and are becoming available at moderate prices.[45] Other parties state that although such devices are available, the Commission's regulation of "dial-a-porn" should not impose the

---

[42] Carlin comments at 11.

[43] *Report and Order*, 49 FR at 24999.

[44] *Second Notice*, 50 FR at 10512.

[45] *See generally* comments of Carlin, AT&T, NYNEX, and Pacific Bell, and letter dated May 14, 1985 from William L. Cocoran, President, TTC.

cost for such devices upon parents.[46] Even with current or imminent availability of these devices, we believe that placing the burden on subscribers independently to bear the costs to prevent access of minors to "dial-a-porn" services, is not the least restrictive alternative available. *See* discussion at paras. 23-26, above. This does not mean, however, that terminal screening devices are not viable in certain situations. For the benefit of parents who wish to participate in screening calls made from their residences, we note that there are currently or soon will be available devices developed by TTC, NYNEX and Pacific Bell.[47] TCC's device operates without the need for equipment modifications either in telephone company facilities, information provider premises, or residences. By programming the device, customers may block one or several telephone numbers from being dialed from residential telephones. The blocking circuit described by NYNEX similarly is designed for installation at the demarcation point where the telephone company's access line enters the caller's premises. The device's circuit permits blocking of up to 128 telephone numbers.[48] Pacific Bell has announced that it is developing a nominally priced product which will enable customers to prevent calls to the 976 exchange. It plans to market the device as soon as it is developed.[49] These

---

[46] Comments of Morality in Media and United States Catholic Conference.

[47] Letter from William L. Corcoran, President, TTC dated May 14, 1985, and comments submitted by Pacific Bell and NYNEX.

[48] The device may alternately be installed to block a specific telephone (*i.e.*, by installing it at that telephone rather than at the demarcation point.) It is reprogrammable and may be used regardless of type of central office or telephone equipment involved. NYNEX estimates its costs at $50 per circuit.

[49] Pacific's public announcement describing the product was made on NBC's Today Show on July 2, 1985. The price of the device will be less than $10. We make no decision here concerning compliance with Commission policies limiting telephone company provision of terminal equipment. These policies are set forth elsewhere. *See, e.g.*, Second Computer Inquiry, 77 FCC 2d 384 (Final Decision), *aff'd on reconsideration*, 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert.*

(Footnote continued)

kinds of devices quite apart from our regulation will assist parents in effectively supervising their minor children and limiting access to "dial-a-porn" or other message services or telephone numbers. None, however consitutes the least restrictive means of accomplishing the intent of Congress.[50] Requiring telephone subscribers to purchase these devices misallocates the burden of implementing a restriction on access to "dial-a-porn" services by minors. As our discussion above reveals, a less restrictive means is available. For these reasons, we will not promulgate a regulation based on availability of terminal devices capable of providing a blocking function.[51]

28. Under the guidelines set forth in *Carlin* and in view of the absence of data suggesting financial impracticability, we find that an access code requirement is generally less burdensome to "dial-a-porn" purveyors and less restrictive of adult's access to the messages than network blocking alternatives, time channeling or scrambling. Such a regulation requires adults to apply to "dial-a-porn" service providers for authorization or identification codes; however, an access code requirement permits service providers to transmit messages on an uninterrupted basis. Adults who wish to hear the messages are not unduly or unreasonably impaired by the requirement that they obtain identification codes. Message scrambling unreasonably restricts adult's access to the messages because, while it permits service providers to transmit messages on an uninterrupted basis, it requires installation of additional equipment in the homes of adults who wish to hear the services and thus misplaces the burden

---

denied sub nom. Louisiana P.S.C. v. United States, 461 U.S. 938 (1983). (*Computer II*). *See also* Third Computer Inquiry, FCC 85-397, CC Docket No. 85-229, (released August 16, 1985).

[50] Such devices, as noted above, do not offer a restriction on minors' access to "dial-a-porn" services from telephones not so equipped, *e.g.*, a neighbor, pay telephones, etc.

[51] Other methods proposed to restrict minors' access to "dial-a-porn" (*i.e.*, bill notification, preventive advertising campaigns, and disclaimer messages) are useful enhancements to our regulation and to parents' supervisory efforts. We do not believe, however, that individually these methods would satisfy Congress' mandate.

of costs to achieve a restriction to "dial-a-porn" services by minors. Network blocking is currently not universally available and is prohibitively costly. Time channeling is flawed in that it inadequately restricts access by minors to the services. A requirement that imposes the costs of blocking CPE upon parents misallocates the burdens of restricting minor's access to "dial-a-porn" messages. In short, the technical, economic and constitutional burdens associated with these alternatives outweigh the burdens which arise from the implementation of the access code requirement.

29. Several commenting parties argue that constitutional rights to privacy and to unimpaired access to expression limit our ability to restrict access to "dial-a-porn" messages in any manner.[52] Nonetheless, the first amendment does not guarantee unfettered access to obscenity, and the Supreme Court has recognized the right to regulate obscene material and indecent material that is easily accessible to minors.[53] Moreover, Congress has made it clear that interstate transmission of "dial-a-porn" services to minors is unacceptable, and that those who engage in such transmissions are at substantial risk. We conclude, therefore, that an access or identification code requirement complies with the Congressional mandate by effectively restricting access by minors to "dial-a-porn" messages in the least restrictive manner available.[54]

---

[52] *See generally* Comments of ACLU, HBO and ATC, and TRAC. These commenting parties point out the concerns of adults who may want to hear the messages but are reluctant to release personal information to the message providers. Comments submitted by the Attorney General of Minnesota discuss the issues presented as a result of the fact that adults must await the distribution of access codes. These comments suggest that "dial-a-porn" providers devise methods to quickly process access code applications and use advertisements or other means to educate their customers of the requirement.

[53] Miller v. California, 413 U.S. 15 (1973); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[54] Carlin argues that minors resolved to obtain access to the messages will find a way to acquire and circulate authorized access or identification cards. *See also* Cincinnati Bell comments at 3, Dial Info comments at 7. Misuse of credit

(Footnote continued)

Credit Card Restriction

30. In our *Report and Order* we concluded that requiring prepayment by credit card effectively restricts minors' access to live "dial-a-porn" transmissions. We reasoned that because credit cards are not routinely issued to minors, services which require credit card payment are usually limited to adults. We assumed minors who are issued credit cards in their own names are supervised by adults as to the use of the cards. Therefore, we allowed "dial-a-porn" services that require credit card payment before the message begins to operate on a 24-hour basis.[55] Because the court did not overrule the Commission's regulation with respect to requiring credit card payment in advance of live messages,[56] and not finding any reason to reach a contrary conclusion in the augmented record, we find that this credit card provision is a suitable adjunct to the regulation we adopt today in connection with recorded messages. Therefore, "dial-a-porn" providers that require payment by credit card prior to transmission of the messages may operate on a 24-hour per day basis.

Coin Operated Telephones

31. In our *Second Notice* we requested comments on methods to prevent access by minors to "dial-a-porn" messages from public coin telephones. We sought information regarding the percentage of calls to "dial-a-porn" services made from coin operated telephones and the feasibility of implementing a scheme that would restrict minors in the use of these phones to reach the

---

cards or access codes may constitute fraud under state or federal law. No method guarantees that some enterprising minors will never hear the messages. Our regulation, however, is the most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages.

[55] *Report and Order*, 49 FR at 25001.

[56] *Carlin* at 118. In fact, since the court found the credit card restriction a satisfactory restriction to minor's access to the live services, most parties responding to the *Second Notice* offered no comment regarding the credit card requirement and no party submitting comments in this proceeding claims that the credit card restriction is ineffective to meet the mandate of Congress.

message services. NYNEX points out that of the 8,358 calls placed to "adult entertainment" channels in a test area in its MANS network, only 144 (1.72%) originated from pay telephones.[57] Other responding industry commenters state that no technical method implemented at the network, short of exchange blocking, effectively limits minors in the use of coin operated telephones to obtain access to the messages. They state that while blocking devices may be installed for use with equipment-implemented coin telephones, no method can be specifically tailored to central office implemented coin telephones.[58] It appears that the technological difficulties associated with restricting minor's access to "dial-a-porn" messages from central office implemented telephones through screening and blocking schemes are no less significant, and perhaps more so, than other telephone locations. In view of our determination to rely generally on access code schemes, a regulation specific to coin operated appears unnecessary because access codes will be required to complete transmission of "dial-a-porn" messages in all instances unless credit card payment is made before transmission of the messages begins.

Conclusion

32. The regulation we are adopting herein is specifically drawn to achieve the government's compelling interest to protect minors from exposure to messages Congress has found to be obscene or indecent. Compliance with our regulation by "dial-a-porn" message service providers constitutes a defense to prosecution under section 223(b). Our regulation represents the most effective available means to limit minors' access to the messages

---

[57] NYNEX comments at 36 and "Coin-Op Study", Exhibit 6.

[58] Ameritech comments at 17, BellSouth comments at 9, Mountain States, Northwestern and Pacific Northwestern Bell comments at 12 and NYNEX comments at 37. Bell Atlantic states that five of its companies have filed tariffs which require that pay telephone calls to a 976 number be billed to a credit card or charged to a third number. Bell Atlantic comments at 3, Appendix A. Similar tariff restrictions are effective in Pacific Companies' service areas. Pacific Bell comments at 6.

but, at the same time, offers the least restriction on adults' access.[19] While it may incidentally restrict adults' convenience in accessing "dial-a-porn" messages, we believe our regulation reaches just far enough to achieve Congress' mandate and to meet the court's constitutionality guidelines. Further, among all available alternatives, our regulation adversely affects "dial-a-porn" providers' and adults' rights to the least degree possible.

Regulatory Flexibility Analysis

33. Pursuant to relevant provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, we have reviewed this section to determine if there will be a significant impact on a substantial number of small businesses. We believe that our regulation will have some impact on those small business entities that Congress had in mind when it amended section 223 of the Communications Act. We find that any impact of these entities is outweighed by the fulfillment of our statutory mandate to restrict access by minors to the "dial-a-porn" services.

34. Accordingly, it is ordered, that Part 64 of the Commission's Rules and Regulations is amended to provide for revised Subpart B as set forth in the Appendix attached hereto, effective November 25, 1985.

35. It is further ordered, that the Secretary shall cause a copy of this *Second Report and Order* to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 605 of the Regulatory Flelxibility Act, 5 U.S.C. 605. The Secretary shall also cause this *Second Report and Order* to be printed in the **Federal Register**.

---

[19] Since the Court reviewed the former regulation under the exacting standard applied to content-based speech restrictions, *Carlin* at 121, we have analyzed the alternatives under that standard. We would also note that the regulation meets the less restrictive standards applied to "time, place, and manner" regulations. *See generally*, Cox v. New Hampshire, 312 U.S. 509 (1941).

36. Authority for this action is contained in section 8(c) of the Federal Communications Commission Authorization Act of 1983, Pub. Law. No. 98-214, December 8, 1983.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

PART 64—[AMENDED]

Part 64, of Chapter I of Title 47 of the Code of Federal Regulations is amended to provide for a revised Subpart B, consisting of § 64.201, as follows:

Subpart B

§ 64.201 Restrictions on obscene or indecent telephone message services.

It is a defense to prosectuion under section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. 223(b) (1983), that the defendant has taken either of the following steps to restrict access to the communications prohibited thereunder.

(a) Requires an authorized access or identification code before transmission of the subject message begins, where the defendant

(1) Has issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) Has established a procedure to cancel immediately the code of any person upon written telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(b) Requires payment by credit card before transmission of the message.

[FR Doc.85-25101 Filed 10-21-85; 8:45 am]

BILLING CODE 6712-01-M

CARLIN COMMUNICATIONS, INC., and Drake Publisher, Inc., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, Respondent.

CARLIN COMMUNICATIONS, INC., Car-Bon Publishers, Inc., and Drake Publisher, Inc., Plaintiff-Appellants,

v.

William French SMITH, as Attorney General of the United States, and Federal Communications Commission, Defendants-Appellees.

Nos. 270, 295, Dockets 84-4086, 84-6202.

United States Court of Appeals, Second Circuit.

Argued Sept. 17, 1984.

Decided Nov. 2, 1984.

A petition sought review of a rule-making order or regulation of the Federal Communications Commission promulgated in response to a statute, and in a second case an appeal was taken from denial of a preliminary injunction against enforcement of statute by the United States District Court for the Southern District of New York, Constance Baker Motley, Chief Judge. The Court of Appeals, Oakes, Circuit Judge, held that Federal Communications Commission failed adequately to demonstrate that its scheme of regulating "dial-a-porn" services, i.e., by requiring operation only between hours of 9:00 p.m. and 8:00 a.m. eastern time or by requiring payment by credit card before

transmission of the message, was well tailored to its ends or that those ends could not be met by less drastic means, the regulation being both overinclusive and underinclusive, and regulation thus could not stand.

Petition to review granted and regulation set aside; judgment of the district court affirmed.

Before OAKES, KEARSE, and PRATT, Circuit Judges.

OAKES, Circuit Judge.

Carlin Communications, Inc. provides a telephone "service," colloquially called "dial-a-porn," to local and long distance callers at ordinary rates. The callers hear prerecorded messages, which change several times daily as in the case of weather or sports results, describing actual or simulated sexual activity apparently in explicit terms. A dial-it service can receive up to 50,000 calls per hour to an individual number, and, rather incredibly, 800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984. Dial-a-porn, accessible by calls to or in the Metropolitan New York area codes 212, 516, and 914, all to the 976 exchange, was far more popular than the horse-race results, the second most popular dial-it service, which received 79,000 calls per day or 29,000,000 per year. Eighty percent of dial-a-porn calls are local, and twenty percent long distance.

Drake Publisher began offering dial-a-porn in the New York area in February of 1983. Carlin replaced Drake the following month and has since expanded to several cities, advertising the dial-a-porn numbers in adult-type magazines owned by Drake and Car-Bon Publishers, Inc. Under the New York leased-line tariffs, Carlin makes two cents per local or long distance call, and the telephone companies—for local calls, New York Telephone Co. and New England Telephone Co., now the NYNEX Telephone Companies (hereinafter NYNEX), and for long distance calls, American Telephone & Telegraph Co. (hereinafter AT&T) and NYNEX—receive the remaining re enues.

The instant case is really two cases. In one, No. 84-4086, Carlin and Drake petition for review of an FCC rulemaking order or regulation [1] promulgated in response to a statute, 47 U.S.C.A. § 223(b) (Supp.1984,[2] mandating FCC action. In the second case, No. 84-6202, Carlin, Drake and Car-bon[3] appeal from the denial of a preliminary injunction against enforcement of section 223(b) by the United States District Court for the Southern District of New York, Constance Baker Motley, Chief Judge. We affirm the judgment in the appeal, No. 84-6202. We grant the petition to review in No. 84-4086 and set aside the regulation.

THE UNDERLYING STATUTE AND REGULATIONS

The drive to regulate dial-a-porn began when the County Executive for Suffolk County, New York, Peter F. Cohalan, commenced an action against Carlin and the FCC in New York state court, since dismissed.[4] Subsequently, Cohalan and a member of Congress, Thomas J. Bliley (R-Va.) sought to have the FCC terminate Carlin's dial-a-porn service by administrative action under then existing legislation, but the FCC concluded that federal law did not restrict dial-a-porn.[5] In light of the FCC's inaction, Congressman Bliley proposed an amendment to section 223 of the Communications Act, 47 U.S.C. § 223 (1982), as a rider to H.R. 2755, 98th Cong., 1st Sess. (1983), the FCC appropriations bill. The House Committee on Energy and

---

[1] 49 Fed.Reg. 24,996, 25,003 (1984) (to be codified at 47 C.F.R. § 64.201).

[2] Federal Communications Commission Authorization Act of 1983, Pub.L. No. 98-214, § 8, 97 Stat. 1467, 1469.

[3] Hereinafter we use Carlin to refer to both the appellants in No. 84-6202 and the petitioners in No. 84-4086.

[4] *Cohalan v. High Soc'y Magazine, Inc.*, No. 3490/1983 (N.Y.Sup.Ct.), dismissed for lack of jurisdiction on removal, No. CV 83-603 (E.D.N.Y. Mar. 16, 1983).

[5] *In re Application for Review of Complaint Filed by Peter F. Cohalan*, F.C.C. File No. E-83-14, Memorandum Opinions and Orders Adopted May 13, 1983, and March 5, 1984.

Commerce agreed to Congressman Bliley's amendment to H.R. 2755 by voice vote on June 30, 1983, and reported the bill to the full House on September 15, 1983. The legislation prohibited obscene dial-a-porn service:

> Section 8 amends section 223 of the Communications Act of 1934 by adding a new subsection (b) . . . that extends section 223's prohibition against obscene telephone calls to prerecorded messages. Obscene messages, whether made directly or by recording device, are prohibited without regard to whether the sender of the message initiated the call. The Committee intends that this section will prohibit obscene messages otherwise available over "Dial It" services.

H.R.Rep. No. 356, 98th Cong., 1st Sess. 19 (1983), U.S.Code Cong. & Admin.News 1983, pp. 2219, 2235.

With discussion on the floors of both Houses of Congress on November 18, 1983, the legislation was amended into its present form before being passed.[6] The amendment explicitly

---

[6] Section 223(b) as amended provides:

(1) Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

(Footnote continued)

covered "indecent" language and authorized the FCC to promulgate defenses to the Act's coverage. 129 Cong.Rec. H10,559-60 (daily ed. Nov. 18, 1983); *id.* at S10,866-67. Congressman Bliley indicated that "indecent" was to be defined by *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (upholding FCC adjudication that specific broadcast was "indecent" as distinct from obscene).[7] On December 8, 1983, the

---

(3) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either –

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(5) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

Section 8(c) of Pub.L. No. 98-214 mandated that:

The Federal Communications Commission shall issue regulations pursuant to Section 223(b)(2) of the Communications Act of 1934 (as added by subsection (a) of this section) not later than one hundred and eighty days after the date of the enactment of this Act.

[7] While the views of a sponsor of legislation are by no means conclusive, they are entitled to considerable weight, particularly in the absence of a committee report. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27, 102 S.Ct. 1912, 1920-21, 72 L.Ed.2d 299 (1982). Congressman Bliley had this to say about the term "indecent" and *Pacifica, supra*, in his opening remarks in support of his amendment:

> The amendment omits the terms "lewd, lascivious, filthy" from the section 8 of the bill. This change is merely to clarify that

(Footnote continued)

legislation was signed by the President.[8]

In the wake of section 223(b)'s passage, the Commission initiated notice and comment rulemaking proceedings. *See* 48 Fed.

> Congress intends to be consistent with Supreme Court rulings on obscenity which require a violation of community standards and an appeal to prurient interests. In *Manual Enterprises v. Day*, 370 U.S. 478 [82 S.Ct. 1432, 8 L.Ed.2d 639], Justice Harlan observed that though words such as these have different shades of meaning in common usage, they are all aimed at obnoxiously debasing portrayals of sex. Therefore, it is not necessary to keep the litany of terms as currently in the statute to prohibit that kind of material. It was necessary, however, to maintain the term "indecent" since the Supreme Court upheld the FCC's assessment of a fine based on indecent material in the Pacifica case.
>
> I would observe as an aside that the ruling in Pacifica clearly affirms the FCC's ability and authority to examine material to determine whether it is obscene or indecent and to assess fines on that basis. This amendment clarifies that question and obviates the need for the FCC's pending inquiry on that issue, though I believe it was absurd for the FCC to ever consider their authority in that area questionable based on Pacifica.

129 Cong.Rec. H16,559 (Nov. 18, 1983).

[8] Six days after the bill became law, Congressman Kastenmeier, a cosponsor of section 223(b), extended his remarks concerning the legislation in the Congressional Record:

> Last, I would like to take issue with the restrictive interpretation by my colleague of the regulations to be issued by the FCC under section 223(b)(2) of my amendment. As noted in my own earlier remarks:
>
> Congress intends that the FCC promulgate reasonable time, place, and manner restrictions calculated to restrict access to prohibited communications by persons under 18 years of age.
>
> Under the Supreme Court's holding in *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), Congress cannot expect the FCC to impose blanket restrictions on dial-a-porn services if time, place, and manner restrictions are technically infeasible or impracticable. ... [W]e have carefully constructed section 223, as amended, to avoid reducing the adult population to

(Footnote continued)

Reg. 43,348 (1983); 49 Fed.Reg. 2124 (1984). On June 4, 1984, the Commission issued a Report and Order, 49 Fed.Reg. 24,996 (1984), containing the legislatively mandated regulation establishing defenses to prosecution under section 223(b). The regulation, *id.* at 25,003, provides:

> It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1983), that the defendant has taken either of the following steps to restrict access to communications prohibited thereunder:
>
> (a) Operating only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or
>
> (b) Requiring payment by credit card before transmission of the message(s).

Subsection (a) is intended to regulate dial-a-porn services, while subsection (b) is intended to regulate live telephone services providing sexually explicit conversation, which require payment by charge or credit card. Subsection (b) cannot be relied upon by dial-it services because a dial-it caller does not pay "before transmission of the message."

CONTENTIONS OF THE PARTIES AND AMICI

Carlin levels several challenges at the time-channeling regulation. Carlin argues that it is (A) violative of the First Amendment's requirement that a restriction on protected speech be the least restrictive alternative for protecting a compelling governmental interest, (B) either impermissibly overbroad or vague, (C) arbitrary and capricious because the FCC had no legitimate

---

hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that permit adult access while limiting children's access. If, however, no such regulations are feasible, then less restrictive measures rather than broader restrictions will have to suffice to avoid any constitutional infirmity.

129 Cong.Rec. E5966-67 (daily ed. Dec. 14, 1983).

reason for allowing live services to use credit cards and not allowing dial-it services to use automated access codes, and (D) in conflict with common carrier tariffs that require continuous, uninterrupted automatic announcement and recorded program services. Carlin also argues that the statute is vague and overbroad by, inter alia, its proscription of "any obscene or indecent communication." The statute is also said to create an impermissible national standard of obscenity and to constitute an unconstitutional delegation of lawmaking authority.

The Commission counters each of Carlin's claims, arguing, in particular, that the regulatory scheme does not violate the First Amendment because the Commission reasonably rejected as ineffective or impractical other suggested methods for restricting access to dial-a-porn.

The NYNEX Companies, intervenors, argue that the FCC properly rejected proposals for automatic screening and blocking of calls to dial-a-porn services and that the time-channeling regulation does not conflict with telephone company tariffs. AT&T, another intervenor, argues that the FCC did not violate rules prohibiting ex parte contacts by meeting with telephone company representatives on April 16, 1984, to review telephone industry blocking capabilities and that the FCC did not act arbitrarily or capriciously in determining that the industry lacked the capability of effectively blocking calls at customers' request. Home Box Office, Inc. and American Television and Communication Corp., amici, argue that section 223(b) is unconstitutionally overbroad because its coverage is not limited to expression that is obscene under *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Morality in Media, Inc., amicus, argues essentially that the time-channeling regulation is ineffective and fails to satisfy Congress's mandate.

DISCUSSION

In any constitutional case we start with the prudential consideration perhaps best set forth by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee*, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936), that courts should

not "anticipate a question of constitutional law in advance of the necessity of deciding it," *id.* at 346-47, 56 S.Ct. 482-83 (quoting *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885), and citing in text or footnote numerous other cases). Thus, if the FCC regulation is invalid facially or as applied, we need not reach the question of the constitutionality of the underlying statute, which makes it a defense, 47 U.S.C. § 223(b)(2), that the putative defendant "restricted access to persons eighteen years of age or older in accordance with procedures" prescribed by the Commission's regulation. Congress surely did not intend that the statute be enforced without a valid regulation in place. The Justice Department seemed to recognize that the statute was unenforceable absent such a regulation when it advised the district court that it "does not anticipate seeking to enforce subsection (b) of 47 U.S.C. § 223 until the pertinent FCC regulations have been promulgated." Letter of Lawrence Lappe, Chief of General Litigation and Legal Advice Section, Criminal Div., U.S. Dep't of Justice (Dec. 21, 1983). While the letter is couched in qualified terms, its purport would seem to reflect Congress's intent. Thus we look first to the validity of the time-channeling regulation.

Justice Brandeis's caution against considering constitutional questions does not allow us to avoid determining whether the regulation violates the First Amendment, for each of Carlin's nonconstitutional challenges to the regulation fails. While the FCC failed to allow a substantial period of time for comments in response to its ex parte discussions with the telephone company representatives, the procedures attending those discussions cannot be said to run afoul of either the FCC's own regulations or general principles of administrative procedure for notice and comment rulemaking.[9] In addition, Carlin's tariff concerns are

---

[9] The Commission met ex parte with telecommunications industry representatives on April 16, 1984, to discuss the difficulty and cost of implementing blocking and screening schemes. The Commission's ex parte rules, 47 C.F.R. § 1.1231 (1983), adopted in response to *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d

(Footnote continued)

assuaged by NYNEX's argument, concurred in by the FCC, that a recorded message informing callers that sexually suggestive messages are transmitted after 9:00 p.m. would satisfy the tariff. Finally, whatever the problems with the FCC's regulatory determinations, they do not rise to the level of arbitrariness or capriciousness. The FCC had legitimate reasons for distinguishing between the use of credit cards by live pornographical telephone services and the use of credit cards or access codes by dial-a-porn. The live services require payment by credit card. Thus, the credit card regulation engenders no extra costs as applied to live services. Dial-a-porn cannot use credit cards. While it might use an automated access code, any automated access code system would surely impose costs on users, on the services, or perhaps on the carriers. Moreover, live services presumably have operators taking credit card numbers; an automated access code system would not. Treating live and dial-it services differently is not arbitrary and capricious.

Turning to the constitutionality of the regulation, we first assume that Carlin is injured by the regulation of indecent speech. We have to make this assumption because our record, while replete with descriptions of the telephone messages, is singularly devoid of information as to their actual content except for three such messages attached to a complaint by Congressman Bliley. *See supra* note 5. The assumption is not

---

89 (1977), specifically permit ex parte contacts in informal rulemaking proceedings, such as this one, until an item is placed on the Commission's meeting agenda. In fairness to parties who are not included in the ex parte meeting, the rules require that a summary of the subject of the meeting be placed in the record, 47 C.F.R. § 1.1231(b)(2), and that the meeting's occurrence be reflected in a public notice, *id.* § 1.1231(b)(4). Both steps were taken here. *See* FCC Public Notice, No. 4052 (May 8, 1984). Indeed, the Commission went further and placed a transcript of the meeting in the record. We note, however, the public notice that information had been received ex parte, that summaries of it were available, and that responses were invited was not made until May 8, 1984, less than a month before the regulations were announced. This timetable suggests that anyone, including Carlin, had little time to react to the ex parte material. It also offers indirect evidence tending to indicate that the FCC's rule-making was rushed, doubtless due in part to the 180-day congressional injunction, making its investigation somewhat superficial.

inappropriate given the vagaries of the line distinguishing between obscene and indecent speech. With this assumption, we address whether time-channeling is a constitutionally valid means of regulating the kind of speech this regulation seeks to cover.

We recognize that the Supreme Court has usually viewed freedom of expression contextually. Thus, while it has said that obscene "material" is "unprotected" by the First Amendment, *Miller*, 413 U.S. at 23, 93 S.Ct. at 2614; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54, 93 S.Ct. 2628, 2633, 37 L.Ed.2d 446 (1973), it has emphasized that regulatory schemes designed to regulate obscene materials must be "carefully limited" because of the "inherent dangers of undertaking to regulate any form of expression." *Miller*, 413 U.S. at 23-24, 93 S.Ct. at 2614-2615. The Court has also suggested that different (and less restrictive) constitutional limits apply to legislation that prohibits the distribution of certain material to young persons but does not directly infringe upon the right of adults to obtain materials they wish to see. *See Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). So, too, the Court has distinguished between legislation that deals with public displays, unsolicited mailings, or other conduct "thrusting" sexual materials upon those who do not want them, which constitute "an assault upon individual privacy," *Redrup v. New York*, 386 U.S. 767, 769, 87 S.Ct. 1414, 1415, 18 L.Ed.2d 515 (1967), and legislation that regulates the private viewing of sexual material, *Redmond v. United States*, 384 U.S. 264, 265, 86 S.Ct. 1415, 1416, 16 L.Ed.2d 521 (1966) (obscene private correspondence); *cf. Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969) (private possession of obscene matter cannot constitutionally be made a crime). *But cf. United States v. Orito*, 413 U.S. 139, 143-44, 93 S.Ct. 2674, 2677-78, 37 L.Ed.2d 513 (1973) (upholding prohibition of transportation in interstate commerce of obscene materials by common carrier, whether for private or commercial purposes); *California v. LaRue*, 409 U.S. 109, 117-18, 93 S.Ct. 390, 396-97, 34 L.Ed.2d 342 (1972) (nude dancing in bars regulable under Twenty-first Amendment); *Ginzburg v. United States*, 383 U.S. 463, 475-76, 86 S.Ct. 942, 949-50, 16 L.Ed.2d 31 (1966) (dubiously obscene material treated

as obscene when advertised as erotically appealing). Similarly, the Court has, in some cases, looked to the form in which the expression is cast, be it book, magazine, movie, play, or T-shirt, giving books a "preferred place in our hierarchy of values," because they contain "the printed word," *Kaplan v. California*, 413 U.S. 115, 119, 93 S.Ct. 2680, 2684, 37 L.Ed.2d 492 (1973) (but where a book is "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous," *id.* at 116-17, 93 S.Ct. at 2682-83, distribution even to an adult may be ciminalized). Finally, the Court has been sensitive to whether a regulatory scheme operates as a prior restraint on speech. *See, e.g. Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 552-53, 95 S.Ct. 1239, 1243-44, 43 L.Ed.2d 448 (1975) (holding that denial of use of municipal auditorium for a production because of its content constitutes a prior restraint and violates the First Amendment because of a lack of procedural safeguards).

We also pay heed to the plurality opinion of the Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-70, 96 S.Ct. 2440, 2448-2452, 49 L.Ed.2d 310 (1976) (plurality opinion) (upholding adult-film zoning ordinances), that the content of expression is, or may be, relevant in First Amendment analysis, although "[t]he sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place or manner of presenting the speech," *id.* at 64, 96 S.Ct. at 2449. At the same time, we are mindful of the teaching of *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980) (citations and footnote omitted):

> A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." ... As a consequence, we have emphasized that time, place, and

> manner regulations must be "applicable to all speech irrespective of content." ... Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " ... Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.

Finally, we note the Court's recent reaffirmation of the holding in *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), that "the government may not 'reduce the adult population ... to reading only what is fit for children.' " *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983) (quoting *Butler v. Michigan*, 352 U.S. at 383, 77 S.Ct. at 526). The *Bolger* Court, 103 S.Ct. at 2884, also reiterated the language of *Pacifica* that "emphasiz[es] the narrowness of [its] holding," 438 U.S. at 750, 98 S.Ct. at 3041, and highlighted the adverb "uniquely" in the *Pacifica* explanation that broadcasting is "uniquely pervasive" and "uniquely accessible to children, even those too young to read," 438 U.S. at 748, 98 S.Ct. at 3040. *Bolger* thus singles out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication." 103 S.Ct. at 2884.

With this constitutional background in mind, we assess the time-channeling regulation. We begin by noting that the regulation does not warrant the special treatment that the Court has espoused in some contexts. The regulation concerns a telephone service that requires dialing on the part of the would-be listener, as opposed to a public display, an unsolicited mailing, or other means of expression as to withhold his or her consent.[10] Moreover,

---

[10] Although an unconsenting adult may call dial-a-porn by accident or as the result of a practical joke, the caller can avert his or her ear. Moreover, the regulations are not aimed at this problem. At oral argument the FCC General Counsel stated that the statute's knowingly requirement protected Carlin from prosecution on the basis of wrong numbers. Yet this interpretation proves too

(Footnote continued)

the telephone transmits the spoken word, not photographs, moving pictures, or live performances.[11] And, while the aim of the regulation is to limit or prevent access by minors to dial-a-porn messages, its operative effect is to deny access to adults as well. Finally, for the reasons cited by the Court in *Bolger*, it may well be that the Court's holding in *Pacifica* is inapplicable outside the broadcast context.

We must reject the FCC's argument that the regulation should be upheld as a reasonable time, place, or manner restriction. Until better informed, we are required to recognize a certain inconsistency between the language of the *American Mini Theatres* plurality, pointing out the frequent necessity of looking at the content of expression to determine its regulability, and the Court's language in *Consolidated Edison*, calling for a higher standard of scrutiny than reasonableness when a regulation is based on the content or subject matter of speech. For the present, we follow the *Consolidated Edison* approach, noting that, while the Court has stated that "[t]he question whether speech is, or is not, protected by the First Amendment, often depends on the content of the speech," *New York v. Ferber*, 458 U.S. 747, 763, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113 (1982) (quoting *American Mini Theatres*, 427 U.S. at 66, 96 S.Ct. at 2450), a majority of the Court has never accepted the view that courts should establish a hierarchy of categories of protected speech. We take it as a given that the state cannot stifle speech because is disagrees with the speaker's view. Every content-based regulation thus should be reviewed under a stricter scrutiny than that of reasonableness because of the difficulty under *American Mini Theatres*, 427 U.S. at 67, 96 S.Ct. at 2451, of determining whether the state is simply "hostile" to the speaker's point of view. Thus, because the regulation is content based – it does not

---

much; it would protect Carlin from any prosecution. If Carlin does not act knowingly with respect to wrong numbers, it does not act knowingly with respect to minors.

[11] As we have said, we are not concerned here with live services, which requires payment by credit card.

apply to all dial-it services, but only to those transmitting obscene [12] or indecent messages—we scrutinize it more closely.

Under this more exacting scrutiny, we must determine whether the regulation precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. *See Ginsberg, supra.* Such an interest must be served, however, only by "narrowly drawn regulations," *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980), that is, by employing means "closely drawn to avoid unnecessary abridgment," *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976). The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74, 101 S.Ct. 2176, 2185, 68 L.Ed.2d 671 (1981). And the State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations. For example, a statute may be unconstitutional even in the absence of an identifiable less restrictive means if there is "no substantially relevant correlation between the governmental interest asserted and the state's" regulatory scheme. *First National Bank v. Bellotti*, 435 U.S. 765, 795, 98 S.Ct. 1407, 1426, 55 L.Ed.2d 707 (1978) (quoting *Shelton v. Tucker*, 364 U.S. 479, 485, 81 S.Ct. 247, 250, 5 L.Ed.2d 231 (1960)).

In the present case, the FCC has failed adequately to demonstrate that the regulatory scheme is well tailored to its ends or that those ends could not be met by less drastic means. On one hand, the regulation is both overinclusive and underinclusive. As noted above, the regulation denies access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during

---

[12] Of course, Congress and the Commission have a much freer hand with regulating obscene speech, which is not protected by the First Amendment.

the remaining hours. And apparently they do not prohibit Carlin from publishing a continual message suggesting a call-back for explicit sex-talk at the appropriate hour and putting youth on notice about when to call back. Moreover, the record before us offers little that demonstrates why a prohibition on dial-it services is needed during daytime school hours when children are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message.

On the other hand, the rulemaking record does not show that time channeling is the least restrictive method for protecting youths from dial-a-porn. The FCC expressly rejected certain alternatives, but the record provides minimal explanation for why screening or blocking or using access numbers would not be both more effective in limiting the dial-it audience to those over the age of eighteen and less restrictive of adults' freedom to hear what they want when they want to hear it.

One approach suggested by commenters during the rulemaking process involved giving subscribers the option of blocking access to certain telephone numbers from their premises.[13] As the Commission said, "Since neither the Government nor common carriers would be burdened with the responsibility of making obscenity determinations under this approach, First Amendment problems would be avoided." 49 Fed.Reg at 24,998-99. The Commission Report and Order noted that "[s]ubscriber screening schemes may be accomplished either by: (1) The installation of appropriate capability within the local telephone company's central office . . . or (2) The development of a screening function within terminal equipment at the customer's premises." *Id.* at

[13] The Commission noted that "[t]his method is analogous to a scheme used by the postal service whereby individuals may request material that they consider 'to be erotically arousing or sexually provocative' not to be delivered." 49 Fed.Reg. at 24,998-99 (quoting 39 U.S.C. § 3008 (1982)).

24,999. The FCC rejected both options on the basis of comments by the telephone industry. The Commission found that a blocking or screening scheme, whether implemented from the telephone company's central office or customers' premises would require time to develop and could entail costs that would outweigh the benefits to be obtained, so that such schemes do not "at this time, represent viable regulatory option[s]." *Id.*

The telephone industry commenters indicated that central-office blocking would require extensive modifications to existing equipment. "It appears," according to the FCC, "that central-office equipment currently in use is incapable of selective screening or blocking on an entire seven or ten digit basis," *id.*, so that any attempt to provide such a service would first require the development and implementation of special facilities for that purpose. But the Commission does not refer to the option of simply blocking all "976" calls.[14]

The FCC rejected a blocking device installed in telephone equipment at the customers' premises because it required "the development and installation of new equipment." *Id.* According to industry commenters, "no existing commercial device has a screening capability that could be deployed within the subscriber's terminal equipment." *Id.* Yet certain federal buildings actually have blocked all 976 calls,[15] at least since substantial billings were run up in calls from certain Washington offices to dial-a-porn. If the "architecture" of the system works here, why not elsewhere? The record should analyze every option.[16]

---

[14] Blocking 976 exchange calls raises other problems. In order to prevent calls to the dial-a-porn numbers the subscriber would not be able to receive the weather dial-it service or other concededly First Amendment protected information. Nevertheless, without intimating our views were such a regulation adopted, the subscriber would make the choice.

[15] This information was not in the record but was provided during oral arguments.

[16] During the ex parte discussion between the FCC and the telecommunication industry representatives, the participants expressed concern about the cost of

(Footnote continued)

Another approach suggested by commenters was that access to dial-a-porn be restricted by requiring each caller to provide an access number for identification to an operator or computer before receiving the message. Because dial-it services function by allowing multiple callers virtually unlimited simultaneous access to prerecorded messages, requiring operator intervention was thought to be economically impracticable. *Id.* at 25,000. The Commission rejected an automatic access code system not by questioning its technical feasibility[17] but by noting that it "would place substantial economic and administrative burdens on recorded service providers." *Id.* While Carlin argued that the interposition of an automated access or identification code system would be unpalatable administratively and financially prohibitive, we see no great administrative difficulty in having each person who desired access to dial-a-porn services fill out some type of application form, which would then be sent to the appropriate dial-a-porn message service provider who would have to rely on some system of age verification.[18] We recognize, as did the Commission, that the inconvenience associated with this practice might discourage many adults from using the service, and thereby conceivably place its financial viability in jeopardy. We also recognize that such a system would impose burdens upon those adults who do not have access or identification codes but wish to patronize dial-a-porn services, but we need not determine whether this alternative regulatory scheme would present insuperable constitutional problems. The FCC embraced the time-channeling scheme

---

screening to the customer. Yet we do not see why the financial burden could not be placed on dial-it services. For example, an alternative regulation might provide a defense to dial-it services that provide screening devices to telephone customers who request the installation of such devices.

[17] It should be noted that NYNEX, in its brief, suggests that an automated access code system is infeasible. The FCC, however, did not make an assessment of or rely on NYNEX's claim. *See* 49 Fed.Reg. at 25,000.

[18] Perhaps a system of age verification would not be necessary. After all, parents do have "substantial control over the disposition of mail once it enters their mailboxes." *Bolger*, 463 U.S. at ____, 103 S.Ct. at 2884. An access code sent to a child would presumably be intercepted by his or her parents.

in the face of an argument by Carlin that it will have a disastrous financial effect, by noting that there is no evidence that callers will not call after 9:00 p.m., but rejected the automated access code scheme, by accepting Carlin's argument that the scheme jeopardized Carlin's financial viability.[19] The Commission did not make the crucial determination about which scheme would be less restrictive of freedom of expression.

Certainly, the FCC cannot successfully counter Carlin's challenges by arguing that Carlin did not urge these alternative methods of regulation at the rulemaking stage. The FCC's rules apply to everyone and must stand on their own. The FCC must give us a record that shows, convincingly, that the regulations were chosen after thorough, careful, and comprehensive investigation and analysis. Our unanswered questions at oral argument and in this opinion suggest that the FCC has fallen short of that high, but necessary, standard.

In light of our holding, we need not address Carlin's other constitutional challenges to the regulation or its challenges to the facial validity of section 223(b). And while the Government has not stated that it will not enforce the statute after the time-channeling regulation has been set aside, we presume that the Justice Department will continue its earlier policy of not enforcing section 223(b) without a regulation governing dial-a-porn. If the Government does restate its earlier policy, a preliminary injunction is surely inappropriate because of a lack of irreparable injury to Carlin.[20]

---

[19] Dial-a-porn use between the promulgation of the regulation and this decision may provide Carlin and the FCC with data to test the FCC's position. As the FCC acknowledges, any regulation that drives Carlin out of business would seem to fall under *Butler v. Michigan*.

[20] Arguably, in these circumstances, the district court did not go far enough, as it might have dismissed the complaint. As we recently noted in *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 26 (2d Cir.1984): "Ripeness . . . requires a twofold inquiry evaluating the hardship to the parties of withholding judicial determination and evaluating whether the issues are fit for judicial determination." An explicit policy of nonenforcement suggests that

(Footnote continued)

Petition to review granted and regulation set aside. Judgment of the district court affirmed.

---

withholding judicial consideration causes no hardship to Carlin, and the incomplete regulatory scheme shows that the issues are not "fit for judicial determination." Where the Government does not intend to prosecute, there is no justiciable "case or controversy." *See O'Shea v. Littleton*, 414 U.S. 488, 493-94, 94 S.Ct. 669, 674-75, 38 L.Ed.2d 674 (1974); *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41, 44 (2d Cir. 1979); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532, at 241 (1975). However, the Government's letter here was sufficiently equivocal and not expressly applicable to the regulation's being held invalid, as here, so that dismissal of the complaint was, and is at present, unnecessary.

NEWS
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

ACTION IN DOCKET CASE

Report No. 18013 June 5, 1984

FCC MOVES TO RESTRICT MINORS' ACCESS TO "DIAL-A-PORN" SERVICES (GEN. DOCKET 83-989)

The Commission has moved to restrict minors' access to "dial-a-porn" services, live or recorded (such as that offered by *High Society Magazine* and Car-Bon Publishers over New York Telephone Company's facilities).

(The Dial-it number was obtained in a lottery conducted by New York Telephone in January 1983, with the service beginning the following month. A caller dialing the number hears a description of actual or simulated sexual behavior. While New York Telephone does not operate the service, nor assumes any liability, it provides the Dial-It capability under an intrastate tariff, filed with the Public Service Commission of New York, which gives the subscriber exclusive control over the content and quality of the messages recorded.)

Prompted by a complaint filed by Peter F. Cohalan, individually and as County Executive of Suffolk County, N.Y., alleging that New York Telephone had violated Section 223 of the Communications Act by allowing *High Society Magazine* to transmit obscene material over its facilities, the Commission, on September 16, 1983, began an inquiry to determine whether it had the authority to prohibit obscene or indecent transmissions by common carriers or message providers.

Shortly thereafter, Congress amended Section 223, authorizing the Commission to impose civil fines, not to exceed $50,000 per day, upon those who, for commercial purposes, use their telephones or permit others to use telephone facilities under their control to transmit obscene or indecent messages to individuals under 18 years of age. Under statutory mandate, the FCC must issue a regulation restricting access by minors to "dial-a-porn" services by June 5, 1984.

The Commission said it had considered several approaches for restricting minors' access to "dial-a-porn", including requiring automated screening devices, such as access codes; blocking access from coin-operated telephones; and imposing restrictions on the advertisement of such services. Because these methods would involve substantial costs, the Commission concluded it would be more effective to require "dial-a-porn" services to: restrict their hours of operation to between 9:00 p.m. and 8:00 a.m., or accept payment by credit card.

Noting there are two types of "dial-a-porn" services, live and recorded, the Commission reasoned since minors ordinarily are not issued credit cards, live "dial-a-porn" services would be inaccessible to them. While some minors do possess credit cards obtained for them by their parents, parental supervision in the use of the card should bar access by underage callers. Therefore, those services requiring payment by credit card would be permitted to operate 24 hours a day without other restrictions.

However, with respect to recorded services, requiring payment by credit card would be impractical, since these allow multiple calls to access a message simultaneously. In this instance, a more appropriate approach would be to impose an operational hour restriction on "dial-a-porn" services between 9:00 p.m. and 8:00 a.m. Eastern Standard Time, when parents are most likely to be in a position to supervise their children's activities. This restriction would not infringe upon adults' access to these message services.

Action by the Commission June 4, 1984, by Report and Order (FCC 84-253). Commissioners Fowler (Chairman), Quello, Dawson, Rivera and Patrick.

For additional information contact Sharon Kelley, (202) 632-6990.

- FCC -

United States Court of Appeals

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of January one thousand nine hundred and eighty-eight.

Present: HON. JAMES L. OAKES
HON. AMALYA L. KEARSE,

Circuit Judges,

HON. DUDLEY B. BONSAL,*

District Judge.

Docket No. 87-4054

CARLIN COMMUNICATIONS, INC., Sapphire of Arizona, Inc., Joy Communications of California Inc., Lynx Communications of California Inc., Sable Communications of California Inc., Sapphire of Colorado Inc., Sapphire Communications of Florida, Inc., Sapphire Communications of Georgia Inc., Sapphire of Iowa, Inc., Sapphire Communications of Kentucky Inc., Sapphire of Louisiana Inc., Joy Communications of Maryland Inc., Sapphire Communications of Maryland Inc., Joy Communications of Michigan Inc., Sapphire of Michigan Inc., Sapphire of Minnesota Inc., Sapphire of Nebraska Inc., Sapphire of Nevada Inc., Sapphire of Oregon Inc., Joy Communications of Pennsylvania Inc., Sapphire Communications of Pennsylvania Inc., Sapphire Communications of Texas Inc., Sapphire of Virginia Inc., Sapphire of Washington Inc., and Sapphire of Washington D.C. Inc.,

Petitioners,

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

—v.—

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents,

Ameritech Operating Companies, American Telephone and Telegraph Co., BellSouth Corporation, Southern Bell Telephone and Telegraph Co. and South Central Bell Telephone Co. ("BellSouth Companies"), Bell Atlantic, and Pacific Bell,

Intervenors.

A petition for review of an order of the Federal Communications Commission.

This cause came on to be heard on the certified list of items comprising the record of the Federal Communications Commission and was argued by counsel.

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is denied; mandate stayed for ninety days to permit parties and intervenor to comply with commission regulations in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

By:
EDWARD J. GUARDARO,
Deputy Clerk

The mandate, consisting of the opinion and order has been received by Shirley E. Fara [sic], dated May 10, 1988.

(June 29, 1983)

Amendment to H.R. 2755

Offered by Mr. Bliley

After section 4 insert the following new section:

Clarification and Administration of Section 223

Sec. 5. (a) Section 223 of the Communications Act of 1934 (47 U.S.C. 223) is amended by inserting "(a)" before "Whoever" and by adding at the end thereof the following new subsection:

"(b)(1) Whoever—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent, regardless of whether the maker of such comments placed the call, or

"(B) knowingly permits any telephone facility under such person's control to be used for any purpose prohibited by subparagraph (A),

shall be fined not more than $50,000 or imprisoned not more than six months, or both.

"(2)(A) In addition to the criminal penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) for commercial purposes shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

"(B) A fine under this paragraph may be assessed either—

"(i) by a court, pursuant to a civil action by the commission or any attorney employed by the Commission who is designated by the Commission for such purpose, or

"(ii) by the Commission, after appropriate administrative proceedings.

"(3)(A) Either the Attorney General, or the Commission or any attorney employed by the Commission who is designated by the Commission for such purpose, may bring suit in a district court of the United States to enjoin any act or practice which allegedly violates paragraph (1)(A) or (1)(B).

"(B) Upon a proper showing that, weighing the equities and considering the likelihood of ultimate success, a preliminary injunction would be in the public interest, and after notice to the defendant, such preliminary injunction may be granted. If a full trial on the merits is not scheduled within such period (not exceeding 28 days) as may be specified by the court after issuance of the preliminary injunction, the injunction shall be dissolved by the court."

(b) Section 223 (a) of the Communications Act of 1934 (as redesignated by subsection (a) of this Act) is amended—

(1) in paragraph (1), by striking out subparagraph (A); and

(2) in paragraph (2), by inserting "facility" after "telephone".

STATEMENT OF REP. THOMAS J. BLILEY, JR.
ON "DIAL-A-PORN" AMENDED

Mr. Chairman, this amendment deals with a problem that is probably familiar to most of the members of the Committee: dial-a-porn. Dial-a-porn is an obscene telephone recording service run as a promotional and money-making activity for High Society, a hard-core smut magazine in New York City.

The problem is caused by the fact that the new technology which dial-a-porn employs can handle over 36,000 calls per hour. This feature, combined with the widespread advertising of the number by High Society and its dissemination in schools has lead to a large number of calls to this number by children as young as ten. The problem is not limited to the New York area, parents as far away as New Mexico, Utah and Colorado have complained as have many other parents elsewhere.

Along with a number of others I have taken numerous steps to have this problem address in the current statutory and legal framework, but thus far we have been frustrated not because anyone disagrees that the transmissions are obscene, but because we have not yet been able to get a hearing on the merits of our complaint.

In February of this year Suffolk County, New York went to court to stop dial-a-porn. The suit was dismissed, without prejudice, because the County had not exhausted its administrative remedies. Suffolk County accordingly filed a petition with the Federal Communication Commission asking them to suspend the service. I joined in support of that petition.

When the Subcommittee held oversight hearings in preparation for the legislation now before us I brought this petition to the Commission's attention, and they promised an expeditious examination.

I wrote to the Justice Department, as did Paul Trible who is a member of the Commerce Committee in the Senate, asking them to investigate and attempt to stop the service.

After two months of consideration the FCC's common carrier bureau dismissed the complaint and "sent" the matter to the Department of Justice. I would note that the FCC's action fell short of even an official referral which would have implied an FCC request for action.

After the Common Carrier bureau's dismissal I requested and got a meeting with FCC Chairman Mark Fowler and General Counsel Bruce Fein. Fowler continued to support the FCC's inaction on several grounds, including lack of statutory authority to deal with the question.

After that meeting I wrote the President asking him to intervene since the matter seemed to have gotten stalled somewhere between FCC and Justice. Just last week, then, the Department of Justice wrote back to FCC that Justice was not the proper agency to act and the the Commission should proceed with administrative action. Thus far the Commission has not responded.

My colleagues, I recount these activities to show that myself and others have taken every reasonable step to get a hearing of our complaint, yet in four months we have gotten exactly nowhere.

The amendment I am offering today would not predetermine the result of any action, though I am confident that if the transmissions involved in dial-a-porn do get to court they will be found obscene. What the amendment would do is clarify that this kind of service is covered by obscenity standards, and it would fix responsibility for determining and punishing obscenity.

Specifically, the amendment would: raise the fine for obscene telephone messages from $500 to $50,000; clarify that the law applies to recordings, and regardless of who places a call; allow the FCC to assess a civil fine of up to $50,000 per day if the violation is for commercial purposes; and, allow the FCC or the Department of Justice to seek a court injunction to prevent further violations of Section 223.

My amendment would not in any way alter current obscenity standards and decisions of the supreme court or other courts.

I would not in any way involve common carriers, unless the carrier itself originated the obscenity. The amendment would not allow monitoring of telephone conversations for obscenity. In other words, the amendment has been carefully crafted to comply with existing standards on obscenity and free speech and to avoid any violation of the First Amendment.

The Amendment was originally drafted by the Office of General Counsel at the FCC. Commission Chairman Fowler offered several criticisms which we address. The Amendment was discussed at length with the staff of the Telecommunications Subcommittee, and again, several changes were made. No legislation is perfect, but I have attempted to draw this amendment as narrowly as possible while still address the problem of how we even get a hearing on obscenity complaints.

I would like to thank the Chairman of the Subcommittee and his staff for their cooperation in drafting this amendment, and to commend him for his willingness to work something out in this area which I know he feels is very delicate.

I urge the Committee to adopt this amendment.

In addition, in the bill are two amendments sponsored by the gentleman from Virginia (Mr. Bliley). One of those which he had worked out with the gentleman from Wisconsin (Mr. Kastenmeier) relates to the so-called dial-a-porn issue. The second amendment which the gentleman from Virginia (Mr. Bliley) had been concerned about related to the Public Broadcasting System interest-free loans. Both of those amendments are now included in the bill.

(Mr. Bliley asked and was given permission to revise and extend his remarks.)

Mr. Bliley. Mr. Speaker, reserving the right to object, I rise in support of the amendment.

Mr. Speaker. I would like to express my thanks to the gentleman from Wisconsin, a member of the Committee on the Judiciary and the gentleman from Colorado, chairman of the Subcommittee on Telecommunications for their cooperation in this matter.

The Judiciary Committee has, in the pending amendment, redrafted the amendment I originally offered in the Energy and Commerce Committee to more closely follow Supreme Court rulings on obscenity. I am not a lawyer, and the committee's expertise in this area far exceeds my own, so I appreciate their assistance.

I would observe that the Judiciary Committee amendment is not designed to make substantive changes in the amendment as reported from the Energy and Commerce Committee. The amendment clarifies our intent to target obscene material which may be available to children.

The amendment omits the terms "lewd, lascivious, filthy" from the section 8 of the bill. This change is merely to clarify that Congress intends to be consistent with Supreme Court rulings on obscenity which require a violation of community standards and an appeal to prurient interests. In *Manual Enterprises v. Day*, 370 U.S. 478, Justice Harlan observed that though words

such as these have different shades of meaning in common usage, they are all aimed at obnoxiously debasing portrayals of sex. Therefore, it is not necessary to keep the litany of terms as currently in the statute to prohibit that kind of material. It was necessary, however, to maintain the term "indecent" since the Supreme Court upheld the FCC's assessment of a fine based on indecent material in the Pacifica case.

I would observe as an aside that the ruling in Pacifica clearly affirms the FCC's ability and authority to examine material to determine whether it is obscene or indecent and to assess fines on that basis. This amendment clarifies that question and obviates the need for the FCC's pending inquiry on that issue, though I believe it was absurd for the FCC to ever consider their authority in that area questionable, based on Pacifica.

The amendment refers to "commercial purposes," and I would like to clarify that it is my understanding and that of the other Members involved that commercial purposes in this context extends not only to activities which may be financially profitable in themselves but also to advertising or promotional activities for ventures such as magazines or movies, and other types of commercial activity.

Finally, I would again like to clarify that no common carrier is liable under this provision unless the carrier itself or a subsidiary or related entity originates the obscene transmission. As long as a common carrier is following the law and FCC regulations, it could not have knowledge of any transmissions by other parties. Therefore, AT&T and other common carriers would not in any way be liable for merely transmitting obscene or offensive messages in the capacity of a common carrier. I would again welcome the confirmation of the gentleman from Colorado on that point.

I thank the gentleman and again the gentleman from Wisconsin and the Committee on the Judiciary for their cooperation in this matter. I urge the adoption of the amendment.

Los Angeles Times
April 14, 1987
at 2

Two Los Angeles-based dial-a-porn companies pleaded guilty to federal charges that they distributed sexually oriented matter by telephone, giving the government its first conviction under a federal law passed nearly four years ago. Adult Entertainment Network Inc. and Adult Entertainment Network Inc. II pleaded guilty to a complaint filed last week by Brent Ward, the U.S. attorney for Utah, charging that sexually explicit material was provided through use of 38 leased telephone lines. Ward said the companies were fined $100,000 apiece on their guilty pleas to two counts of making obscene communications to teen-agers in the Salt Lake City area and agreed to pull out phone lines.

U.S.A. Today,
April 14, 1987
at 7A

UTAH

Hogup Ridge — 1st of three 85-ton pumps built to lower Great Salt Lake was switched off, back on in test. Next: April 24 start for 2nd pump; 2 weeks later for 3rd pump. . . . **Salt Lake City** — Pleading guilty to selling sexually explicit material to teens by telephone: 2 Adult Entertainment Network Inc. companies, of Los Angeles. Fine: $100,000. Dial-a-porn lines will be removed.

Associated Press
April, 1987

Dial-a-porn firms plead guilty in Utah

SALT LAKE CITY (AP) — Two dial-a-porn firms offering taped telephone sex messages have pleaded guilty and paid $50,000 fines in what federal attorneys say is the nation's first conviction under a new anti-smut statute.

U.S. Attorney Brent Ward said Adult Entertainment Network Inc. and Adult Entertainment Network Inc. II, both of Los Angeles, pleaded guilty Monday to federal charges of using a telephone to provide obscene or indecent communications to two Utah youths aged 11 and 14.

Judge J. Thomas Green fined each firm $50,000 and ordered them to discontinue dial-a-porn services on all 38 lines available.

The lines are located in the District of Columbia; Los Angeles; San Francisco; San Diego; Sacramento, Calif.; Seattle; Portland, Ore.; New Orleans; New York; Baltimore; Pittsburgh and Philadelphia.

Mr. Ward said it was the first conviction under a dial-a-porn statute passed by Congress in 1983. The statute makes it illegal for companies to distribute obscene or indecent messages by telephone to minors or those who do not request them, said Richard Lambert, assistant U.S. attorney.

Mr. Lambert said companies still can provide telephone sex messages to people with credit card numbers or access codes not normally available to children.

TITLE VI—GENERAL AND MISCELLANEOUS PROVISIONS

Mr. Bliley moves to take from the Speaker's table the bill H.R. 5, together with the Senate amendment thereto, and recede and concur in the Senate amendment with an amendment consisting of the text of that portion of the conference report on the bill H.R. 5 not rejected by the House together with the text of section 7003 of the Senate amendment in place of section 6101 as rejected by the House, as follows: In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

Section 1. Short Title: Table of Contents.

(a) Short Title.—This Act may be cited as the "Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988".

PART B—PROHIBITION OF DIAL-A-PORN

SEC. 6101. AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934.

Section 223(b) of the Communications Act of 1934 is amended—

(1) in paragraph (1)(A), by striking out "under eighteen years of age or to any other person without that person's consent";

(2) by striking out paragraph (2);

(3) in paragraph (4), by striking out "paragraphs (1) and (3)"and inserting in lieu thereof "paragraphs (1) and (2)"; and

(4) by redesignating paragraphs (3), (4) and (5) as paragraphs (2), (3), and (4), respectively.

PART D—GENERAL PROVISIONS

SEC. 6301. DEFINITIONS.

Except as otherwise provided, for the purpose of this Act the terms used in this Act have the meanings provided under section 1471 of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

SEC. 6302. BUDGET ACT PROVISION.

Any new spending authority (within the meaning of section 401 of the Congressional Budget Act of 1974) which is provided under this Act shall be effective for any fiscal year only to the extent or in such amounts as are provided in appropriation Acts.

SEC. 6303. EFFECTIVE DATES.

(a) GENERAL RULE.—Except as otherwise provided, this Act and the amendments made by this Act shall take effect July 1, 1988.

(b) SPECIAL RULES.—(1) Any provision of this Act or any amendment made by this Act which authorizes appropriations for fiscal year 1988 shall take effect on the date of the enactment of this Act.

(2) The provisions of section 2402, relating to the National Center for Vocational Research, shall take effect on April 10, 1988.

(3) The amendments made by section 3403 shall take effect for assessments made after September 30, 1989, with respect to State data.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 28, 1988

REMARKS BY THE PRESIDENT DURING SIGNING CEREMONY FOR H.R. 5, ELEMENTARY AND SECONDARY SCHOOL IMPROVEMENT AMENDMENTS OF 1988

Room 450
Old Executive Office Building
1:39 P.M. EDT

THE PRESIDENT: Thank you all very much, and let me get right to the business at hand. Excellence in education is a key to the health and well-being of society. That's why when I came into office in 1981 I brought a mandate from the American people to turn over a new leaf in education — to rededicate ourselves to the highest standards of achievement and excellence in our nation's schools. Over the last eight years we've made much progress. And working together with Congress, state and local governments, parents, teachers, charitable, religious, and community organizations, and business, we have begun to turn back what our education commission five years ago called "a rising tide of mediocrity that threatens our very future as a nation and a people."

Well we've taken a firm and uncomprising stand against drugs in our nation's schools. We've encouraged a return to basics and common sense in primary and secondary education. And we have shifted authority away from distant federal bureaucracies and returned it to parents, principals, and school boards.

As Secretary Bennett's report this week makes clear, much remains to be done. We remain, as that earlier commission said, "A Nation at Risk." But today, more than ever before, the American people, the federal government, and the states are working together and not at cross purposes. We all have come

to realize what is at stake: our standard of living, the cohesiveness and unity of our society, our moral standards — and in short, our future.

The legislation that I'll sign today is a product of that common purpose. H.R. 5, the "Augustus F. Hawkins – Robert T. Stafford Elementary and Secondary School Amendments of 1988," reauthorizes and improves a wide variety of federal programs at the elementary and secondary school level. At the same time, it recognizes a fundamental truth, that the primary responsibility for educating these children lies with the local communities and the states and not with the federal government.

The School Improvement Act will further this important but supplementary role of the federal government in elementary and secondary education. It will extend programs for the disadvantaged and other students with special needs, stimulate education innovation and reform, enhance local control and flexibility, improve program accountability, and focus program benefits on those with the greatest need. I'm pleased to note that the bill reauthorizes the magnet school program and expands parental choice. I'm also pleased to see that the bill amends the Bilingual Education act in ways that provide greater flexibility to local school districts in the selection of instructional approaches.

This administration has struggled for several years to amend federal bilingual requirements so that we may more effectively teach students English. I'm also pleased that the bill enhances parental involvement in programs for disadvantaged children. Parents are, after all, our first and most important teachers.

These central features of the bill echo the themes that the Vice President, Secretary Bennett and I have been sounding, and I'm pleased that they received overwhelming bipartisan support in both the House and the Senate. From the beginning, we worked with the Congress, educators, and interested members of the public to ensure legislation that would improve basic education for America's youth. I want to commend the members of Congress who are here today for their leadership in guiding this bill through the Congress.

I want to note that this bill renames the Guaranteed Student Loan Program after Bob Stafford. Bob has had a major influence on federal education policy for many years, and I commend him on his distinguished career. (Applause.)

I urge the Congress to focus in the appropriations process on the existing, successful programs that this bill reauthorizes. It is these current programs that offer the greatest promise of educational opportunity and educational excellence to our nation's children.

H.R. 5 also contains provisions making "Dial-a-Porn" services a criminal misdemeanor. I commend Congress for joining the administration's longstanding efforts to combat hard-core obscenity. (Applause.) I am bound to note, however, as much as it displeases me, that current Supreme Court jurisprudence is unfriendly to parts of this bill. And I hope that the courts and the Congress will work with the administration to do as much as is permitted by the Constitution to enforce the provisions of this statute.

On balance, H.R. 5 is a solid achievement; one that deserves to be signed, which I am about to do right now.

(THE BILL IS SIGNED) (Applause.)

Now I'm going to do what the little 11-year-old girl told me to do in a letter that she wrote to me when I first reported here for you. She told me all the things I was going to have to deal with and then said, "Now get over to the Oval Office and go to work." (Laughter and applause.)

END 1:45 P.M. EDT

(2)

No. 88-37

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

7 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-37

CARLIN COMMUNICATIONS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners challenge the constitutionality of Section 223(b) of the Communications Act of 1934 as it was in effect prior to its most recent amendment.

1. In 1983, Congress enacted Section 223(b) of the Communications Act of 1934 to protect children from the harmful effects of sexually explicit telephone messages, commonly known as "dial-a-porn." See Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8, 97 Stat. 1469. As originally enacted, Section 223(b) made it illegal to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent" (47 U.S.C. (Supp. III)

223(b)(1)). The section provided, however, that it would be a defense to prosecution if a provider of such communications restricted access to adults in accordance with "procedures that the [Federal Communications] Commission shall prescribe by regulation" (47 U.S.C. (Supp. III) 223(b)(2)).[1]

After the Second Circuit remanded two prior versions of the Commission's regulations implementing the statute (see *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113 (1984) (Pet. App. A121-A140); *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 855 (1986) (Pet. App. A70-A89)), the Commission adopted a rule that established a defense for those dial-a-porn providers that either (1) required credit-card payment or access codes before transmission of a recorded message, or (2) scrambled their messages so that they would be unintelligible to a caller without a descrambler. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd 2714, 2722-2723 (1987) (Pet. App. A28-A64). Petitioners, a group of affiliated dial-a-porn providers, filed a petition for review of the Commission's regulation and challenged the constitutionality of the underlying statute on the grounds that it was overbroad and vague, violated due process, created an illegal national standard of obscenity, and unconstitutionally delegated power to the Commission (Pet. App. A18-A20).

The court of appeals upheld the Commission's regulation as a "feasible and effective way to serve" the "compelling government interest" in "protect[ing] minors from

[1] Section 223(b) provided for criminal penalties of up to $50,000 in fines and six months' imprisonment for each violation (47 U.S.C. (Supp. III) 223(b)(1)(B)), and authorized the Federal Communications Commission (Commission) to initiate proceedings to impose civil fines for violations of the law (47 U.S.C. (Supp. III) 223(b)(4)).

obscene speech" (Pet. App. A16). The court, however, limited the statute's reach to telephone messages that are obscene but not indecent. The court of appeals reasoned that the statute would be unconstitutional if "the term 'indecent' [were] to be given meaning other than * * * obscenity" (Pet. App. A25). The court rejected petitioners' remaining challenges to the statute, as so interpreted. The court ruled that Section 223(b) "does not create [a] * * * national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials * * *, or the broadcasting of obscene messages" (Pet. App. A26 (citations omitted)). The court further held that it would be "premature" to determine whether the Commission's authority to punish violations of Section 223(b) is consistent with due process. And the court held that the statute's delegation of authority to the Commission to promulgate regulations "is accompanied by sufficient guidelines and standards for the exercise of the authority" (Pet. App. A27).

2. Soon after the court of appeals' decision, Congress revisited the problem of preventing access by children to dial-a-porn. Congress reviewed the Commission's experience in trying to craft regulations and concluded that it was "not technologically possible to keep this information out of the hands of young people." 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). Congress determined that the only effective solution to prevent access by children is to prohibit sexually explicit telephone messages altogether. See *id.* at H1691 (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("if a so-called technological solution to the access

of our children to dial-a-porn had been available, I, of course, would have supported it"). Accordingly, in April 1988, Congress amended Section 223(b) to prohibit dial-a-porn altogether by eliminating the Commission's authority to establish defenses to prosecution. See Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424.[2] Section 223(b), as it now reads, bans entirely the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication."

3. Petitioners renew their constitutional challenge to the superseded version of Section 223(b). The recent amendment to Section 223(b), however, eliminated the legal effect of the Commission's regulation that the court of appeals reviewed. And petitioners have never been prosecuted or otherwise sanctioned under the superseded version of Section 223(b). Thus, petitioners' request for judicial review of the Commission's rule, which was promulgated under the superseded version of Section 223(b), is now moot. The Court should reject petitioners' suggestion (Pet. 12) to render what would be, in the context of this case, an "advisory opinion[ ] on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). See *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

Some of the constitutional issues raised by petitioners are also raised by petitioner Sable Communications of California, Inc., in a different lawsuit challenging the current version of Section 223(b). In that case, the District

[2] The House and Senate passed the amendments on April 19 and 20, 1988. See 134 Cong. Rec. H1836 (daily ed. Apr. 19, 1988); *id.* at S4386 (daily ed. Apr. 20, 1988). The President signed the new law on April 28, 1988 (24 Weekly Comp. Pres. Doc. 540 (May 2, 1988)) and it became effective on July 1, 1988.

Court for the Central District of California upheld the constitutionality of the current version of Section 223(b) insofar as it prohibits obscene telephone communications.[3] On September 26, 1988, Sable filed a jurisdictional statement seeking review of that decision. See *Sable Communications of Calif., Inc.* v. *FCC*, No. 88-515. Sable's appeal, not this case, is the proper vehicle for considering Congress's ban on obscene dial-a-porn messages now contained in Section 223(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

[3] The California district court enjoined the enforcement of Section 223(b) insofar as it prohibits *indecent* commercial telephone communications. The government has filed a jurisdictional statement asking for plenary review of that aspect of the court's decisions. See *FCC* v. *Sable Communications of Calif., Inc.*, No. 88-525 (jurisdictional statement filed Sept. 26, 1988).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-037/80700

No. 88-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

MEMORANDUM FOR THE PETITIONERS IN REPLY

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York 10017
(212) 949-9022

Attorneys for Petitioners

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLIN COMMUNICATIONS, INC., SAPPHIRE OF ARIZONA, INC., JOY COMMUNICATIONS OF CALIFORNIA INC., LYNX COMMUNICATIONS OF CALIFORNIA INC., SABLE COMMUNICATIONS OF CALIFORNIA INC., SAPPHIRE OF COLORADO INC., SAPPHIRE COMMUNICATIONS OF FLORIDA, INC., SAPPHIRE OF GEORGIA INC., SAPPHIRE OF IOWA, INC., SAPPHIRE COMMUNICATIONS OF KENTUCKY INC., SAPPHIRE OF LOUISIANA INC., JOY COMMUNICATIONS OF MARYLAND INC., SAPPHIRE COMMUNICATIONS OF MARYLAND INC., JOY COMMUNICATIONS OF MICHIGAN INC., SAPPHIRE OF MICHIGAN INC., SAPPHIRE OF MINNESOTA INC., SAPPHIRE OF NEBRASKA INC., SAPPHIRE OF NEVADA INC., SAPPHIRE OF OREGON INC., JOY COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF PENNSYLVANIA INC., SAPPHIRE COMMUNICATIONS OF TEXAS INC., SAPPHIRE OF VIRGINIA INC., SAPPHIRE OF WASHINGTON INC., and SAPPHIRE OF WASHINGTON D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

MEMORANDUM FOR THE PETITIONERS IN REPLY

ARGUMENT

Respondents oppose this petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered on January 15, 1988 and modified on April 4, 1988 on the ground that judicial review of the FCC's Third Report and Order, F.C.C. 87-143, 2 F.C.C. Rcd 2714 (1987), (A-17-A-28)[1], has been mooted by the recent amendment of Section 223(b). Respondents further oppose this petition on the ground that the appeal to this Court, Docket No. 88-515, by Sable Communications of California, Inc. of the decision by the District Court for the Central District of California which determined the constitutionality of Section 223(b) as amended, is the proper decision for review.[2]

Contrary to respondents' assertion, petitioners have not sought review of that portion of the Second Circuit's decision which upholds the FCC's Third Report and Order. Petition at 13. Petitioners have only asked this Court to review the Second Circuit's rulings on constitutional issues raised by petitioners below which have not been mooted by the amendment of Section 223(b). That amendment restored the language "or indecent", deleted from the statute by the Second Circuit, to prohibit obscene or indecent telephone communications and eliminated all defenses to prosecution. Petition at 10-11, 14-15, 17-18. The analysis and holdings by the Second Circuit on these issues has not been negated by the amendment to Section 223(b). In *Sable Communications of California, Inc. v. F.C.C.*, the District Court in

---

[1] All references in parenthesis beginning with "A- " followed by a number are to the numbered pages of Appendix A annexed to the petition. All references in parenthesis beginning with "B" followed by a number are to the numbered pages of Appendix B annexed hereto.

[2] A copy of the decision in *Sable Communications of California, Inc. v. F.C.C.*, Docket No. CV 88-3353 AWT (C.D. Cal. July 19, 1988) is annexed hereto in Appendix B. It should be noted that the respondents herein have taken an appeal of the California District Court's decision, Appeal No. 88-525.

ruling on the constitutionality of Section 223(b) as amended specifically found that the amendment of Section 223(b) did not affect the validity of the Second Circuit's analysis, which the District Court relied upon, on the issue of whether Section 223(b) creates an impermissible national standard of obscenity (B-4). A decision by this Court would not, as respondents maintain, be an advisory opinion on abstract propositions of law. The issues decided by the Second Circuit are applicable to the amendment of Section 223(b).

Petitioners continue to face a real and present danger of indictment under Section 223(b), Petition at 15-17, for violations which took place prior to July 1, 1988, the effective date of the amendment to Section 223(b). Section 223(b) is governed by a three year statute of limitations. Petitioners disagree with respondents' view that this appeal is moot since the government has targeted them for prosecution and consequently, their liberty is at stake. Petition at 8 (A-146-A-150). Petitioners should not have to wait to be prosecuted before challenging the constitutionality of Section 223(b).

Petitioners respectfully suggest that in view of the similarity of some of the issues raised in this petition for a writ of certiorari and the pending appeal of Sable Communications of California, Inc., No. 88-515, that these two appeals be joined.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE E. ABELMAN*
NORMAN S. BEIER
PETER J. LYNFIELD
ELIZABETH M. BARNHARD
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York 10017
(212) 949-9022

Attorneys for Petitioners

*Counsel of Record

October 19, 1988

APPENDIX

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SABLE COMMUNICATIONS OF CALIFORNIA, INC., etc.,	)	
Plaintiff,	)	NO. CV 88-3353 AWT
v.	)	MEMORANDUM DECISION
FEDERAL COMMUNICATIONS COMMISSION, et al.,	)	
Defendants.	)	

BACKGROUND

Effective July 1, 1988, 47 U.S.C. §223(b) was amended by the Telephone Decency Act to provide:

(1) Whoever knowingly

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) In addition to the penalties for paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each

violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) (A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either -

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

Plaintiff, a major purveyor of 976 IAS dial-a-porn messages, has moved for a preliminary injunction (the parties having stipulated that pending the hearing, defendants will not enforce §223(b) against plaintiff).

A concrete controversy exists. *See Sable Communications, Inc. v. FCC*, 827 F.2d 640 (9th Cir. 1987) (addressing challenge to pre-amended §223(b)). In fact, plaintiff has been "chilled"– it has "softened" its messages. Since invasion of First Amendment rights is at issue, plaintiff has unquestionably met the irreparable injury requirement. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

INDECENT SPEECH

What is at issue is the breadth to be given to *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Court concludes that *Pacifica* does not reach §223(b); thus, that in the final analysis the statute in its present form is overbroad and unconstitutional, at least insofar as it applies to "indecent" communications.

First, *Pacifica* itself emphasized its own narrowness. *Id.* at 750-51. The narrowness of *Pacifica*'s holding was reiterated by the Court in *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). As the Second Circuit noted:

> *Bolger* thus singles out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication."

Carlin Communications, Inc. v. FCC, 749 F.2d 113, 120 (2d Cir. 1984) (quoting *Bolger*, 463 U.S. at 74). *See also Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* does not apply to cable television).

This narrow reading of *Pacifica* is consistent with Ninth Circuit precedent. "The First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to 'hearing only what is fit for child.' " *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957), *cert. denied*, 108 S. Ct. 1586 (1988).

While the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, §223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment. *Mountain States Tel.*, 827 F.2d at 1296.

OBSCENE SPEECH

On the other hand, obscene speech is unprotected by the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). Plaintiff

does not argue against this well-established proposition. Rather, plaintiff contends that §223(b) abolishes *Miller*'s community standard requirement and, in effect, establishes a single national standard, subjecting its dial-a-porn messages to the most puritanical standard that exists anywhere in the country. The Second Circuit has already addressed this contention and found it wanting:

> We are also unpersuaded by Carlin's remaining facial constitutional challenge to section 223(b). The statute does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.

Carlin Communications, Inc. v. FCC, 837 F.2d 546, 561 (2d Cir. 1988) (addressing pre-amended §223(b)) (citations omitted). In light of this square holding (the amendment of §223(b) does not affect the validity of the Second Circuit's analysis), the Court concludes that plaintiff cannot meet even the alternative test — that a serious question is raised. *American Motorcyclists Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). More importantly, if a preliminary injunction were to issue, it would mean that plaintiff would be free to transmit obscene dial-a-porn messages. Beyond doubt the public interest would be disserved by such a preliminary injunction and effect on the public interest is a factor which the Court must consider. *Id.* at 967.

SEVERABILITY

In view of these divergent conclusions on the two parts of §223(b), the Court must next consider whether the "obscene" and "indecent" components of the statute are severable from each other — whether Congress would have enacted the one without the other. An unconstitutional provision is presumptively severable and that presumption should be applied. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (White, J.) (citations omitted). *See also Brockett v. Spokane Arcade, Inc.*, 472 U.S. 491 (1985) (applying "normal" rule of severability to First

Amendment case to sever "lust" from otherwise constitutional anti-obscenity statute). Here, no reason appears, certainly not at the preliminary injunction stage, not to apply the normal rule of severability.

CONCLUSION

For the foregoing reasons, a preliminary injunction shall issue prohibiting enforcement of §223(b) as to any communication alleged to be "indecent." The motion for a preliminary injunction is othewise denied.

Dated July 19, 1988 /s/ _____

A. WALLACE TASHIMA

United States District Judge